

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Appeals for  
the Federal Circuit and the United  
States Court of International Trade

Vol. 20

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MAY 21, 1986

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No. 20

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Appeals to CAFC

THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

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# U.S. Customs Service

## *Treasury Decision*

(T.D. 86-95)

Reimbursable Service—Excess Cost of Preclearance Operation

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, D.C., February 2, 1986.*

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning April 27, 1986.

Installation	Biweekly excess cost
Montreal, Canada .....	\$27,072
Toronto, Canada .....	38,400
Kindley Field, Bermuda .....	19,432
Nassau, Bahama Islands .....	32,988
Vancouver, Canada .....	16,990
Winnipeg, Canada .....	4,104
Freeport, Bahama Islands .....	16,607
Calgary, Canada .....	10,121
Edmonton, Canada .....	6,908

D. LYNN GORDON,  
*Acting Comptroller.*

[Published in the Federal Register, May 7, 1986 (51 FR 16947)]



# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao,

James L. Watson

Gregory W. Carman

Jane A. Restani

Dominick L. DiCarlo

Thomas J. Aquilino, Jr.

*Senior Judges*

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi



# Decisions of the United States Court of International Trade

(Slip Op. 86-43)

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES,  
DEFENDANT

Court No. 85-06-00788

INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., PLAINTIFFS  
*v.* UNITED STATES, DEFENDANT

Court No. 85-07-00905

Before WATSON, *Judge*.

In consolidated actions contesting final results of administrative review of anti-dumping finding involving television receiving sets from Japan, plaintiffs moved for judgment upon agency record on challenge to ITA's calculation of adjustment for Japanese commodity tax pursuant to 19 U.S.C. § 1677a(d)(1)(C).

*Held:* ITA abused its discretion by failing to increase United States price by amount of tax forgiven on merchandise exported to United States; and by failing to measure tax absorption in home market sales so as to limit adjustment by amount of tax passed through to home market purchasers. ITA's assumption that tax was fully passed through in all cases is not supported by substantial evidence.

[Plaintiffs' motions granted; ITA determination reversed and remanded.]

## MEMORANDUM OPINION AND ORDER

(Decided April 24, 1986)

*Frederick L. Ikenson, P.C. (Frederick L. Ikenson and J. Eric Nissley), for plaintiff Zenith Electronics Corporation.*

*Collier, Shannon, Rill & Scott (Paul D. Cullen, Patrick B. Fazzone and Laurence J. Lasoff), for plaintiffs Independent Radionic Workers of America, et al.*

*Richard K. Willard, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch (Velta A. Melnbrensis), for defendant.*

*Weil, Gotshal & Manges (A. Paul Victor, Stuart M. Rosen, Charles H. Bayar and Michelle S. Benjamin), for defendant-intervenors Matsushita Electric Industrial Co., et al.*

*Sharretts Paley Carter & Blauvelt, P.C. (Gail T. Cumins and Neil H. Marshak), for defendant-intervenors, Sanyo Electric Co., Ltd.*

*Siegel Mandell & Davidson, P.C. (Brian S. Goldstein and Edward B. Ackerman) for defendant-intervenor The General Corporation of Japan.*

*Baker & McKenzie (Thomas P. Ondeck and Arthur L. George) for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.*

WATSON, Judge: These consolidated actions are brought by Zenith Electronics Corporation ("Zenith"), an American manufacturer of television sets, and by three unions<sup>1</sup> representing American workers engaged in television manufacturing, contesting the final determination of the United States Department of Commerce, International Trade Administration ("ITA"), in *Television Receiving Sets, Monochrome and Color, From Japan*, 50 Fed. Reg. 24278 (June 10, 1985). The determination stems from an administrative review of an antidumping finding, conducted pursuant to 19 U.S.C. § 1675(a), covering television sets exported to the United States by 16 Japanese manufacturers and/or exporters between April 1, 1980 and March 31, 1981. The ITA, in all cases, concluded either that there was no dumping or that the dumping margins were *de minimis* or small (not exceeding 0.86% *ad valorem* weighted average margin).

Presently before the court are motions by Zenith for judgment upon the agency record in case No. 85-06-00788,<sup>2</sup> and by the Unions for partial judgment upon the agency record in case No. 85-07-00905.<sup>3</sup> The two motions involve identical challenges to the method by which the ITA calculated the adjustment for the Japanese commodity tax under 19 U.S.C. § 1677a(d)(1)(C). Zenith and the Unions contend that the ITA violated the requirements of that provision by (1) reducing foreign market value by the amount of commodity tax assessed on home market sales, rather than increasing United States price by the amount of tax forgiven on exports to the United States, and (2) assuming a full pass-through of the commodity tax to customers in home market sales, rather than determining the extent to which the tax was included in home market price so as to limit the commodity tax adjustment to that amount.

The defendant, United States, opposes plaintiffs' motions, but has filed cross-motions for remand in both cases. The defendant requests that the ITA be permitted on remand (1) to seek information concerning the appropriate commodity tax base for the exported merchandise, and (2) to reconsider the pass-through issue in light of its subsequent determination in *Grand and Upright Pianos From the Republic of Korea*, 50 Fed. Reg. 37561 (Sept. 16, 1985). Alternatively, the government asks the court to hold that no pass-through analysis is required under § 1677a(d)(1)(C).

Two additional opposing positions are taken by the intervening defendants representing Japanese exporting interests. The Mitsubi-

<sup>1</sup> The plaintiff unions are the Independent Radionic Workers of America, The International Brotherhood of Electrical Workers, and The International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO-CLC. They are collectively referred to herein as "the Unions".

<sup>2</sup> Zenith's motion, made pursuant to Rule 56.1 of this court, was originally a motion for partial judgment. Zenith has since abandoned its remaining challenges, which involved issues decided adversely to Zenith in *Zenith Radio Corp. v. United States*, 9 CIT —, 606 F. Supp. 695 (1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986). See letter to court from counsel for Zenith, dated February 12, 1986.

<sup>3</sup> The Unions have raised two claims in their complaint which are not covered by their Rule 56.1 motion. The first, contesting foreign market value adjustments for certain discounts and rebates, was resolved adversely to the Unions in *Zenith Radio Corp. v. United States*, *supra*. The second claim challenges the ITA's use of weighted average margins. Because the parties have not briefed this issue, the court will reserve determination thereon.

shi company-intervenors<sup>4</sup> ("Mitsubishi") seek remand but would require the ITA to make an upward adjustment to United States price either in the amount of tax collected on comparison home market sales, or in the amount of tax forgiven on exports coupled with an additional circumstances of sale adjustment to home market price. Several other Japanese interest intervenors<sup>5</sup> (collectively referred to as "Matsushita *et al.*" or "joint intervenors") jointly contend that the adjustment performed by the ITA was within its discretion and should be affirmed either as a reasonable method of performing the tax adjustment under § 1677a(d)(1)(C) or as a circumstances of sale adjustment required under 19 U.S.C. § 1677b(a)(4)(B). Both Mitsubishi and Matsushita *et al.* contend that § 1677a(d)(1)(C) does not require the ITA to make a pass-through determination.

### BACKGROUND

Under the antidumping law, dumping margins for sales of imported merchandise are calculated by comparing determinations of foreign market value ("FMV") and United States price ("USP"). 19 U.S.C. § 1673. Where merchandise identical or similar to the imported merchandise is sold in the home market of the exporting country, FMV is determined from the home market price of that merchandise, pursuant to 19 U.S.C. § 1677b(a)(1)(A). In the absence of such sales, FMV may be determined from a price method using export sales to countries other than the United States, pursuant to 19 U.S.C. § 1677b(a)(1)(B), or a non-price method known as constructed value, pursuant to 19 U.S.C. § 1677b(a)(2) and (e). Determinations of USP are based upon the import "purchase price", as defined in 19 U.S.C. § 1677a(b), or if the first sale to an unrelated American purchaser occurred in the United States, upon the "exporter's sales price", as defined in 19 U.S.C. § 1677a(c). To these price or value determinations, various upward and downward adjustments are made pursuant to statutory provisions and Commerce Department regulations to arrive at determinations of FMV and USP. The "absolute dumping margin" for a sale is the amount, if any, by which FMV exceeds USP. Absolute margins are calculated for the assessment of antidumping duties. The "*ad valorem* (or percentage) margin" for a sale is the ratio of the absolute margin over the USP. The "*ad valorem* weighted average margin" for sales during the period under investigation or review is the total amount of absolute margins on individual sales divided by the total USP for all entries. See 19 U.S.C. § 1677b(f) (1982) (authorizing use of averaging or sampling for determinations of FMV). The ITA calcu-

<sup>4</sup> The Mitsubishi intervenors consist of Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

<sup>5</sup> The joint intervenors are comprised of Matsushita Electric Industrial Co., Ltd., Panasonic Company and Quasar Company (divisions of Matsushita Electric Corporation of America), Panasonic Hawaii, Inc. and Panasonic Sales Company (a division of Matsushita Electric of Puerto Rico, Inc.); Victor Company of Japan, Ltd. and US JVC Corp.; Sanyo Electric Co., Ltd.; and The General Corporation of Japan.

lates *ad valorem* margins for purposes of issuing and revoking orders and setting cash deposit rates. See 50 Fed. Reg. at 24279.

The antidumping law contemplates that the unadjusted price determinations by the ITA are "after-foreign-tax prices", in the sense that they are measured after the producing country has assessed indirect taxes tied to the manufacture or sale of the merchandise in question. One such tax is the Japanese Commodity Tax, an *ad valorem* tax which Japan imposes on many types of products, including television receivers. For televisions with screen sizes under 27 inches, the commodity tax rate is 15% of the manufacturer's ex-factory sales price, based either on actual wholesale price or suggested retail price less a standard deduction. Commodity Tax Law of Japan (13 March 1962, Law No. 48), as amended, Arts. 11, 13. Like most countries that impose excise or consumption taxes on goods, Japan assesses the commodity tax on sales for domestic consumption, but does not collect the tax on export sales. *Id.*, Arts. 19, 21.

To prevent dumping margins from arising merely because the country of exportation assesses such taxes on home market sales but not on export sales, the antidumping law provides for an offsetting adjustment in the calculation of United States price. The provision, 19 U.S.C. § 1677a(d)(1)(C) (1982), states:

The purchase price and the exporter's sales price shall be adjusted by being \* \* \* increased by \* \* \* the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in a country of exportation.

This adjustment, by its terms, has two components. First, USP—whether determined by purchase price or exporter's sales price—is to be increased by the amount of foreign taxes imposed directly upon the exported merchandise or its components, which have been forgiven (rebated or not collected) because the merchandise was exported to the United States. Second, the adjustment is to be limited or "capped" by the amount that such taxes are added to or included in the price of comparison merchandise sold in the home market.

#### ITA PROCEEDINGS

In its preliminary results and tentative determination, published August 18, 1983 (48 Fed. Reg. 37506, 37508), the ITA indicated that it computed the FMV of most Japanese television models under review based upon the delivered price of such merchandise to customers in the home market, in accordance with 19 U.S.C.

§ 1677b(a)(1)(A).<sup>6</sup> Its determinations of USP were based upon "purchase price" or, where appropriate, "exporter's sales price", pursuant to 19 U.S.C. § 1677a(b) and (c). Among the adjustments made to USP was the foreign tax adjustment under 19 U.S.C. § 1677a(d)(1)(C). The ITA stated that in all cases, it calculated an addition to purchase price or exporter's sales price "for the amount of Japanese commodity tax not collected because of the exportation of the merchandise to the United States." *Id.* at 37507. It was later disclosed, however, that the ITA in fact did not add to USP the amount of tax forgiven on export merchandise, but instead added the full amount of the tax paid on comparison home market sales.<sup>7</sup> Because the Japanese commodity tax is an *ad valorem* tax (imposed as a percentage of price), these two amounts would not be the same unless the tax-free prices of exported and domestically sold merchandise were the same. Where the United States export price is less than the non-taxed home market price, the addition to USP under the ITA's approach would be greater than that called for by the terms of § 1677a(d)(1)(C).

In its final determination, published June 10, 1985 (50 Fed. Reg. 24278), the ITA again adjusted for the full amount of commodity tax paid on comparison sales in Japan, but this time instead of adding that amount to the purchase price or exporter's sales price in its determinations of USP, the ITA subtracted that amount from the home market price in its determinations of FMV.<sup>8</sup> The ITA agreed with Zenith and the Unions, petitioners below, that this methodology conflicts with the directives of § 1677a(d)(1)(C) and was specifically rejected by Congress when it enacted the 1921 Anti-dumping Act. The agency's explanation for nevertheless having taken this approach was two-fold. First, it noted that in cases where dumping margin would exist in the absence of taxes, the statutory approach artificially increases (or "multiplies") the absolute dumping margin.<sup>9</sup> Conversely, the method employed in the

<sup>6</sup> In certain cases where there were insufficient comparison sales in the home market, the ITA computed FMV based upon the price of exports to Canada, pursuant to 19 U.S.C. § 1677b(a)(1)(B), or upon the constructed value of the exported merchandise, pursuant to 19 U.S.C. § 1677b(a)(2).

<sup>7</sup> The ITA acknowledged the actual methodology used in the preliminary results in the recitation of comments to the final determination, at comment 1:

Zenith and the Unions argue that the Department erred when, in its preliminary results of administrative review, it added to United States price the commodity tax imposed on the home market merchandise. They contend that [19 U.S.C. § 1677a(d)(1)(C)] clearly directs the Department to add to U.S. price the tax amount that would have been imposed had it been sold in Japan.

50 Fed. Reg. at 24278. See also *Color Television Receivers From Korea*, 49 Fed. Reg. 7620, 7622 (Mar. 1, 1984) (comment 1).

<sup>8</sup> The ITA had also employed this approach in three interim determinations, involving television receivers from Korea and Taiwan. *Color Television Receivers From Korea* ("Korean Televisions I"), 49 Fed. Reg. 7620 (Mar. 1, 1984) (final determination of sales at less than fair value); *Color Television Receivers From Taiwan* ("Taiwan Televisions"), 49 Fed. Reg. 7628 (Mar. 1, 1984) (final determination of sales at less than fair value); *Color Television Receivers From Korea* ("Korean Televisions II"), 49 Fed. Reg. 50420 (Dec. 28, 1984) (final results of administrative review of antidumping duty order).

<sup>9</sup> This "multiplier" effect can be illustrated in the following example: Suppose the pre-tax home market price for a certain model of Japanese television is equal to \$100, while the purchase price for the same model when sold for export to the United States is \$90. In this tax-free comparison, the absolute margin of dumping would be \$10 (\$100 - \$90) and the *ad valorem* margin would be 11.1% (\$10/\$90).

Since the Japanese commodity tax is 15%, the tax on the home market sale equals \$15 (15% of \$100). If we assume that this tax is fully shifted forward to the home market purchaser, then the after-tax home market

*Continued*

agency's preliminary findings (i.e., adding to USP the tax paid on home market sales), in such cases, artificially suppresses *ad valorem* (or percentage) margins.<sup>10</sup> The ITA believed that the margin distortions caused by either method were further increased by significant differences in the circumstances of sale and the physical characteristics of the merchandise. Only by deducting from FMV the amount of commodity tax paid on home market sales, as the ITA did in its final determination, is pure tax neutrality achieved in calculations of both absolute and *ad valorem* margins.<sup>11</sup> Second, the ITA claimed it was unable to establish from the information it obtained "what the appropriate tax basis would be for the exported merchandise and exactly how the Japanese taxing authority would calculate the amount of tax on exported merchandise." It therefore felt that the deduction of home market taxes from FMV was "a reasonable alternative calculation \* \* \* based on the best available information." *Id.* at 24279.

The ITA further acknowledged that the "cap" provision in § 1677a(b)(1)(C) directs the agency to measure the degree to which a seller absorbs the tax in home market sales, and to limit the adjustment to the amount of tax shifted forward to purchasers. The petitioners below emphasized that several Japanese manufacturers granted various after-invoice discounts, rebates or other allowances to home market purchasers, which, because they were not certain at the time of sale, did not reduce the commodity tax base. Zenith argued that the amount by which a manufacturer's commodity tax value plus commodity tax exceeded the manufacturer's home market sales price reported to the ITA represents the amount of the commodity tax not passed on to the purchasers. The ITA rejected Zenith's approach and, in effect, merely assumed a full pass-through of the commodity tax, stating:

Discounts and rebates may be provided for a number of reasons, and we have no evidence of a relationship between the discounts and rebates and the manufacturer's commodity tax liability. Absent evidence that clearly demonstrates that a manufacturer's commodity tax cost is not reflected in home market sales prices, the Department may reasonably conclude that cost and price are directly related. To date, the Depart-

price equals \$115. By contrast, the amount of tax rebated or not collected on the exported television because it was sold for export would equal only \$13.50 (15% of \$90). Hence, if the United States price were increased by this latter amount, in accordance with the terms of 19 U.S.C. § 1677a(d)(C), the adjusted calculation of USP would be \$103.50 (\$90 + \$13.50). The absolute margin, determined by subtracting the adjusted USP from the after-tax home market price, would be \$11.50 (\$115 - \$103.50), an amount greater than the \$10 absolute margin calculated in the tax-free comparison, above. The *ad valorem* margin, however, would be identical, at 11.1% (\$11.50/\$103.50).

<sup>10</sup> Continuing the example in footnote 9, if the United States price of the television were increased by the amount of Japanese commodity tax actually collected on the home market sale, as the ITA did in its preliminary determination, the adjusted USP would be \$105 (\$90 + \$15). Under this approach, the absolute margin would be equivalent to the margin found in the tax-free comparison, \$10 (\$115 - \$105), but the *ad valorem* margin would be reduced to 9.5% (\$10/\$105).

<sup>11</sup> Again using the example in footnote 9, if the home market price were reduced by the amount of the tax on the domestic sale, as the ITA did in its final determination, the adjusted home market price would be \$100 (\$115 - \$15). The absolute and *ad valorem* margins, therefore, would be equivalent to their respective levels in the tax-free comparison, i.e., \$10 (\$100 - \$90) and 11.1% (\$10/\$90).

ment has not developed a reasonable method for isolating the cost-price relationship for individual adjustments.

*Id.*

In a subsequent determination in *Grand and Upright Pianos From the Republic of Korea* ("Korean Pianos"), 50 Fed. Reg. 37561 (Sept. 16, 1985), the ITA declared that its previous interpretation of § 1677a(d)(1)(C) to require the measurement of tax absorption in home market sales was incorrect. The ITA now concluded that Congress inserted the "pass-through" clause in § 1677a(d)(1)(C), as part of the Trade Act of 1974, to accommodate the effect possible future treaties or judicial decisions might have on the standards employed by the Treasury Department in administering the countervailing duty law, for the purpose of ensuring "harmonized tax treatment" between the Antidumping Act and the countervailing duty law. Because Treasury's practice of not regarding as an unfair subsidy the non-excessive rebate of final stage indirect taxes (such as the Japanese commodity tax) has since been upheld, the pass-through clause should be read as simply applying to the antidumping law the underlying assumption that final stage indirect taxes are fully shifted forward. *Id.* at 37562-65. The ITA further felt that to interpret § 1677a(d)(1)(C) otherwise would produce conflict with the complementary purpose of 19 U.S.C. § 16771(d)(1)(D) in a combined countervailing duty and antidumping case. *Id.* at 37565. Finally, the ITA compared differences in final stage tax liability to differences in material cost or credit expenses, and stated that it perceived "no economic justification for adjusting the home market-U.S. price differential by anything less than the actual amount of final stage taxes paid by the producers."<sup>12</sup> *Id.*

#### STANDARD OF REVIEW

Plaintiffs having brought these actions pursuant to 19 U.S.C. § 1516a(a)(2), the applicable standard of review is whether the challenged determination by the ITA is supported by substantial evidence on the record and is otherwise in accordance with the law.<sup>13</sup> 19 U.S.C. § 1516a(b)(1)(B).

#### ADJUSTMENT TO FOREIGN MARKET VALUE

The ITA correctly acknowledged that the offsetting adjustment for the forgiveness of Japanese commodity taxes on merchandise exported to the United States is governed by 19 U.S.C.

<sup>12</sup> The ITA stated in *Korean Pianos* that it adjusted USP "for indirect taxes imposed upon home market merchandise which have not been collected upon exported merchandise by reason of its exportation to the United States." 50 Fed. Reg. a 37561. This language and the language quoted above would seem to indicate that the ITA's adjustment to USP, purportedly made pursuant to § 1677a(d)(1)(C), was not for the amount of tax rebated or not collected on the exported merchandise, but was rather for the amount of tax actually collected on home market merchandise—in other words, that the ITA employed the methodology it used in the preliminary determination in this case.

<sup>13</sup> The court rejects the government's suggestion in its motions for remand that the court should simply order a remand to the ITA without deciding the legal issues raised in plaintiffs' Rule 56.1 motions.

§ 1677a(d)(1)(C).<sup>14</sup> Hence, the first issue before the court is whether the ITA unlawfully departed from the requirements of that provision by subtracting from FMV the amount of commodity tax collected on home market merchandise<sup>15</sup> (irrespective of the "pass-through" issue, considered below).

While it has been said that a reviewing court should give "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law", *Smith-Corona Group v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984), such deference must be restricted to issues left open by the statutes themselves. As the Supreme Court recently stated:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent \* \* \*. If a court, employing traditional rules of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 n. 9 (1984) (citations omitted). *Accord Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 106 S. Ct. 681, 686 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the

<sup>14</sup> Joint intervenors, *Matsushita et al.*, contend that, notwithstanding the ITA's stated rationale, 19 U.S.C. § 1677a(b)(1)(C), by its terms, applies only to taxes "imposed by the country of exportation directly upon the exported merchandise", whereas Japan does not "impose" the commodity tax on exported merchandise, but "exempts" such merchandise from tax treatment. Hence, the intervenors argue, the ITA's adjustment to FMV for the tax collected on home market sales should be sustained as a circumstances of sale adjustment required under 19 U.S.C. § 1677b(a)(4)(B).

Congress clearly could not have intended an interpretation of § 1677a(d)(1)(C) along the lines advanced by *Matsushita et al.* At best, such an interpretation would frustrate the purpose of the adjustment by making its application turn not on whether the exported merchandise was selectively not taxed by the exporting country, but on how that country has characterized the non-taxation. At worst, it would make the provision an absurdity by demanding that the foreign tax for which the adjustment is made be "assessed" or "collected" on the exported merchandise, even though the adjustment expressly applies where taxes "have not been collected by reason of the exportation of the merchandise." It is evident that the "imposed" language merely signifies that the tax must be imposed on the class or kind of merchandise that has been exported. Thus, for example, if the Japanese commodity tax were not imposed on television receiving sets, no commodity tax adjustment would be made for Japanese televisions exported to the United States. Cf. *Lewyt Corp. v. Commissioner of Internal Revenue*, 349 U.S. 237, 240 (1954) (comparable interpretation of "imposed" in similar statutory context); *In re Robbins' Estate*, 47 N.W. 2d 889, 890 (Wis. 1951) (same).

<sup>15</sup> The government argues that regardless of whether the ITA's use of this methodology was lawful, it did not materially prejudice the interests of the complainants. This argument is difficult to reconcile with the government's request for a remand of this issue. In any case, the government is mistaken. The illustration presented in the government's brief in opposition to the Union's motion (at page 18, note 6) assumes that an adjustment which increases USP would be in the same amount as the ITA's adjustment which decreased FMV by the tax assessed on home market sales. Obviously, if this were the case, absolute margin levels would be unchanged and *ad valorem* margins would actually be reduced. However, because the illustration also assumes that the exported merchandise is being dumped (i.e., sold at a lower price than the taxable home market price), the respective adjustments would not be in the same amounts unless (a) the foreign tax were a "unit" or "flat-rate" tax (which is not true of the Japanese commodity tax on televisions), or (b) the upward adjustment to USP were in the amount of the tax collected on home market sales rather than the amount forgiven on export sales (which plaintiffs contend the ITA may not do). See note 10, *ante*. If the statutorily required adjustment is an addition to USP in the amount of the commodity tax forgiven on exports, as plaintiffs contend, then in instances where dumping would be found in the absence of taxes, that amount would be less than the amount by which the ITA decreased FMV in its final determination. The absolute margins in those instances would be increased. Because *ad valorem* margins would not change, only instances where the ITA previously found non-de minimis margins would be affected (assuming plaintiffs were to prevail solely on this issue).

clearly expressed intent of Congress."); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

The language of 19 U.S.C. § 1677a(d)(1)(C) clearly and unambiguously delineates the adjustment to be performed by the Commerce Department. Specifically, the provision calls for an upward adjustment to USP (rather than a downward adjustment to FMV) in the amount of tax that would have been assessed on the exported merchandise had it been sold in the home market (rather than the amount of tax actually assessed on merchandise sold in the home market). While the final clause of the provision sets a "cap" on the amount of the adjustment, the statute gives no indication that the ITA has discretion to employ alternative methods of performing the adjustment.

The pertinent legislative history of this provision uniformly echoes Congress' unmistakable intent that the adjustment be an increase to the USP in the amount of tax rebated or not collected on the exported merchandise. See *S. Rep. No. 16*, 67th Cong., 1st Sess. 11-12 (1921); *H.R. Rep. No. 571*, 93d Cong., 1st Sess. 69-70 (1973); *S. Rep. No. 249*, 96th Cong., 1st Sess. 93-94 (1979); *H.R. Rep. No. 317*, 96th Cong., 1st Sess. 75 (1979). Moreover, as the ITA acknowledged, when the provision was first enacted as part of the Antidumping Act of 1921, Congress specifically considered and rejected the method of adjustment used in the ITA's final determination in this case.

Like the ITA's approach, antidumping legislation originally proposed in the House of Representatives had provided that the measure of FMV (referred to as "foreign home value") was *not* to include any excise taxes levied on merchandise sold in the foreign home market. See *Hearings on Anti-dumping Legislation Before the House Committee on Ways and Means*, 66th Cong., 1st Sess. 6 (1919). Customs officials strongly criticized this proposal as difficult to administer, and urged Congress to adopt a definition of FMV that would include such taxes and would thus correspond to "actual market value" used in both the Customs Administrative Act of 1890 and the Tariff Act of 1913 in the context of normal customs valuation for assessment of ordinary duties. *Id.* at 14-19. See generally *United States v. Passavant*, 169 U.S. 16 (1898). The House, nevertheless, adopted bills in 1919 and 1921 which defined FMV to exclude foreign excise taxes. See 59 Cong. Rec. 327, 351 (1919); 61 Cong. Rec. 254 (1921). The Senate Finance Committee, however, redrafted the House proposals and specifically rejected the House definition of FMV. The Senate committee instead defined FMV, consistent with ordinary dutiable value, to include taxes imposed on merchandise sold in the foreign home market. See *S. Rep. No. 510*, 66th Cong., 2d Sess. 2 (1920); *S. Rep. No. 16*, 67th Cong., 1st Sess. 2 (1921). In addition, to prevent dumping margins from arising due to the forgiveness of such taxes on exports, the final Senate version

provided for an upward adjustment to USP ("purchase price" and "exporter's sales price") in

the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

*Id.* These provisions of the Senate proposal survived the House-Senate conference unchanged and were passed into law with the enactment of the Emergency Tariff Act of 1921, Title II of which was the Antidumping Act of 1921. Sections 203, 204, 42 Stat. 12, 13 (1921). Although Congress enacted limitations to the adjustment in the Trade Act of 1974 (discussed below), the basic structure has remained unchanged.

The ITA, therefore, departed from the clear requirements of the statute (a) in its final determination, by making the adjustment a decrease to FMV rather than increase to USP, and (b) in both its preliminary and final determinations, by adjusting for the amount of tax actually assessed on home market merchandise rather than the amount of tax which would have been assessed on the merchandise exported to the United States had it been sold in the home market.

These departures by the ITA cannot be justified by reference to past administrative interpretation of § 1677a(d)(1)(C). Most significantly, the ITA has denied that a consistent methodology for calculating the adjustment has been employed in past determinations. *Korean Televisions, I*, 49 Fed. Reg. at 7623; *Taiwan Televisions*, 49 Fed. Reg. at 7631. In any event, such a justification is not possible in situations where, as here, the agency acknowledges that its approach conflicts with the approach intended by Congress. 50 Fed. Reg. at 24279. See also *Korean Televisions I*, 49 Fed. Reg. at 7623; *Taiwan Televisions*, 49 Fed. Reg. at 7631; *Korean Televisions, II*, 49 Fed. Reg. at 50421. Furthermore, because the applicable Commerce Department regulation, 19 C.F.R. § 353.10(d)(1)(iii)<sup>16</sup>, tracks the language of 19 U.S.C. § 1677a(d)(1)(C) almost *verbatim*, the court must conclude that the ITA's methodology in this case conflicts with the directives of that regulation, by the agency's own interpretation.

Intervening defendants, Matsushita *et al.*, seek to justify the ITA's approach by reference to what the ITA concluded is the fundamental purpose of the adjustment: to achieve a comparison of United States and foreign prices for the merchandise which is "tax neutral." The joint intervenors argue that the ITA's procedure of

<sup>16</sup> 19 C.F.R. § 353.10(d)(1)(iii) (1981) provides:

Purchase price and exporter's sales price shall be adjusted by being—

(1) Increased by:

(iii) The amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

reducing FMV by the amount of the commodity tax imposed on home market sales was reasonable and appropriate because it achieved the goal of tax neutrality better than the statutory adjustment to USP, and was based on information more readily obtained and verified. The intervenors further argue that if the ITA had adhered to the statute and increased USP by an amount estimated to be the tax forgiven on the exported merchandise, the agency would then have been required, in cases where that amount was less than the tax collected on home market sales, to make an additional "circumstances of sale" adjustment to FMV in the amount of the difference, pursuant to 19 U.S.C. § 1677b(a)(4)(B). Although the government, unlike *Matsushita et al.*, requests a remand rather than affirmance, it defends the ITA's position that the adjustment in § 1677a(d)(1)(C) was intended to achieve pure tax neutrality. The government suggests that if the ITA determines on remand that it is unable to obtain "satisfactory information" regarding the Japanese commodity tax base, the agency would be justified in employing a non-statutory methodology such as it employed in the prior determinations.

Even if the defendants' resort to the "fundamental purpose" of the legislation were availing in the face of the clear statutory directive, the court is unpersuaded that Congress did not intend the adjustment in § 1677a(d)(1)(C) to operate as it does. When Congress rejected the 1919 and 1921 House proposals to exclude foreign excise taxes from FMV in favor of the statutory adjustment to USP (discussed at 18-19, *ante*), it surely could have seen from simple calculations (such as those performed by the court in notes 9-11, *ante*) that the rejected approach would achieve a tax neutral comparison in all cases, whereas the enacted approach is (purely) tax neutral only in cases where there is no pre-tax dumping.<sup>17</sup> The comments of the Senate Finance Committee, which drafted the enacted provision, on the operation of the adjustment were as follows:

In order that \* \* \* any excise tax which is refunded or not collected upon the exportation of the merchandise shall not constitute dumping, it is necessary also to add such items to the purchase price.

\* \* \* \* \*

In order that \* \* \* any excise tax which is refunded or not collected upon the exportation of the merchandise shall not constitute dumping, the term "exporter's sales price" is defined to include such items.

<sup>17</sup> The ITA seems to imply that Congress chose the latter approach only because Customs officials complained that the subtraction of foreign taxes from FMV was administratively "infeasible." See 50 Fed. Reg. at 24279. Such complaints, however, were obviously directed against any adjustment to offset foreign taxes; for the difficulties attendant with the subtraction from the home market price of foreign taxes actually paid would *a fortiori* be encountered in an adjustment which adds rebated or uncollected foreign taxes to purchase price and exporter's sales price.

*S. Rep. No. 16*, 67th Cong., 1st Sess. 12 (1921). These comments express the concern that dumping margins not arise *solely* because the exported merchandise is exempted from foreign taxation, which the statutory adjustment achieves. They do not show that Congress intended the adjustment to be purely tax neutral in cases where dumping is otherwise found to occur. Furthermore, in a 1957 report on the operation and effectiveness of the Antidumping Act, the Secretary of the Treasury specifically informed Congress that the statutory approach achieves tax neutrality only where there is no dumping.<sup>18</sup> Although the report proposed several statutory revisions, which became the source of the 1958 amendments to the Antidumping Act (including the "circumstances of sale" adjustment emphasized by the intervenors), the report did not recommend that the tax adjustment provision be revised; nor did it suggest that Treasury was dissatisfied with the provision's operation.<sup>19</sup>

To properly evaluate the operation of the USP adjustment in § 1677a(d)(1)(C), attention must be given not only to the administrative concern of achieving fair price comparisons, but also to the fundamental aim of the antidumping law to eliminate injurious less than fair value sales of merchandise exported to the United States. As previously noted, the statutory adjustment does achieve tax neutrality with respect to *ad valorem* margins, but operates to increase absolute margins in cases where dumping margins would be present in the absence of taxes. The amount of the increase is proportional to the size of the pre-tax dumping margin. Any "unfairness" to a foreign producer resulting from the statutory adjustment, therefore, is the direct outgrowth of that producer's injurious less than fair value pricing. Rather than pursue such practices and face the assessment of proportionally increased antidumping duties, the producer can avoid the duties by simply adjusting its prices (raising United States price or lowering home market price) to eliminate the pre-tax dumping margins. Because the adjustment is tax neutral when the pre-tax home market price does not exceed

<sup>18</sup> The relevant remarks in the Secretary's report were as follows:

[A]llowance shall be made, in calculating price to the United States market, for import duties of internal taxes, such as sales taxes, which are remitted by the country of export. In each case the amount remitted is added to the price to the United States market; and in calculating the home-consumption price the export duty or internal tax will similarly be included. *To the extent that the figures are the same, and ordinarily they will not differ materially—they will cancel out.*

"Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of the Antidumping Act and Amendments to the Act Considered Desirable or Necessary," in *Hearings on Amendments to the Antidumping Act of 1921, As Amended Before the House Committee on Ways and Means*, 85th Cong., 1st Sess. 13 (1957) (emphasis added). The report was submitted to Congress as required by section 5 of the Customs Simplification Act of 1956. 70 Stat. 943, 948 (1956).

<sup>19</sup> In support of their contention that the statute is intended to achieve pure tax neutrality, the government and *Matsushita et al.* rely primarily on remarks made by William L. Gifford, Assistant Secretary of Treasury for Legislative Affairs, in a letter of June 3, 1973 to John M. Martin, Chief Counsel of the House Ways and Means Committee. Mr. Gifford therein stressed that "the failure to add such tax to the price of the merchandise to the United States price, if it is rebated or remitted upon exportation, would distort any price comparisons and unfairly create or increase the size of dumping margins." *Hearings Before the House Committee on Ways and Means on H.R. 6767*, 93d Cong., 1st Sess. 2395 (1973). This remark was not directed to the issue of tax neutrality, but was made in response to a proposal which would have completely eliminated the adjustment to USP for remitted taxes while continuing to include the amount of such taxes in home market price. The administration, understandably, was concerned that such a proposal would *unfairly* create or increase margins of dumping.

the United States price, the statute provides an incentive, not present in the ITA's approach, for foreign producers to discontinue injurious dumping.

As the Supreme Court recently emphasized,

The "plain purpose" of legislation \* \* \* is determined in the first instance with reference to the plain language of the statute itself. \* \* \* Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.

*Board of Governors v. Dimension Financial Corporation*, 106 S. Ct. at 688-89 (citation omitted). The methodology plainly commanded by § 1677a(d)(1)(C) embodies the degree of tax neutrality Congress sought to implement and may not be disregarded by the ITA on the ground that some other method would produce a "fairer" comparison, *see id.*; *Aaron v. SEC*, 446 U.S. 680, 695 (1980), or would be more "reasonable" or "efficient". *See United States v. H. Rosenthal Co.*, 609 F.2d 999, 1001-02 (C.C.P.A. 1979). Only Congress, not Commerce, may effect such a revision.

The intervenors' contention that the ITA's adherence to the terms of § 1677a(d)(1)(C) would necessitate an additional "circumstances of sale" adjustment under 19 U.S.C. § 1677b(a)(4)(B)<sup>20</sup> to reduce margins to their pre-tax levels is without merit. The anti-dumping law does not support the proposition that a tax differential generated by actual dumping constitutes an adjustable difference in the circumstances of sale under § 1677b(a)(4)(B). Such a construction would defeat the fair-value-pricing incentive inherent in the operation of § 1677a(d)(1)(C), the provision specifically addressed to the adjustment for remitted taxes. It would also defeat the tax-neutrality of § 1677a(d)(1)(C) with respect to *ad valorem* margins, by artificially suppressing such margins in cases where dumping is present.<sup>21</sup> Nothing in the language or legislative history of § 1677b(a)(4)(B) indicates that Congress intended such a result—even though, as noted above, the report of the Secretary of the Treasury which proposed the circumstances of sale adjustment also observed that the foreign tax adjustment to USP is tax neutral only in the absence of pre-tax dumping margins. The congressional reports to the 1958 amendments only cite such items as "differences in the terms of sale, credit terms, and advertising and selling costs" as examples of adjustable differences in the circumstances of

<sup>20</sup> 19 U.S.C. § 1677b(a)(4)(B) (1982) provides:

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or the fact that the United States Price is the same as the foreign market value) is wholly or partly due to—

(B) other differences in circumstances of sale

then due allowance shall be made therefor.

<sup>21</sup> This would provide foreign manufacturers or exporters with a means to circumvent the scrutiny of the antidumping law, in cases where *ad valorem* margins would otherwise be just above the *de minimis* level.

sale. *S. Rep. No. 1619*, 85th Cong., 2d Sess. 7 (1958); *H.R. Rep. No. 1261*, 85th Cong., 1st Sess. 7 (1957). The applicable ITA regulation, 19 C.F.R. § 353.15, likewise, lists these sorts of examples but makes no mention of the adjustment serving to offset margin increases arising from the operation of § 1677a(d)(1)(C). Clearly, there is no basis for the circumstances of sale adjustment advocated by the intervenors.<sup>22</sup>

Finally, the failure of the ITA to perform the adjustment to USP in accordance with § 1677a(d)(1)(C), by adding the uncollected commodity tax to purchase price and exporter's sales price, cannot be excused on the ground that the agency was unable to determine what the amount of the tax would be. Such an explanation is patently untenable, particularly where the foreign tax is simply an *ad valorem* tax calculated upon a statutorily defined price-base.

Article 11 of the Japanese Commodity Tax Law provides that the tax base for Class 2 commodities (which includes television sets) is an amount equal to the manufacturer's freely-offered wholesale price at the time of shipment from the factory. Hence, as this court observed in *Zenith Radio Corp. v. United States*, 9 CIT —, 606 F. Supp. 695, 698 n. 7 (1985), "[t]he Japanese Commodity Tax Law defines the taxable basis of the television sets in terms which are virtually identical to the terms of foreign market value." Because purchase price and exporter's sales price are defined so that determinations may be fairly compared with determinations of FMV, it would seem relatively simple to arrive at an appropriate basis for calculating the amount of commodity tax which was not collected on the exported merchandise.

The government points out that Article 13 of the Japanese Commodity Tax Law sets forth an alternative method for determining the tax base, using the manufacturer's published suggested retail price less a standard deduction to cover ordinary profits and expenses of sellers other than the manufacturer, freight charges, and the amount of the commodity tax. The government expresses uncertainty as to when Article 13 would come into play. Article 13 appears to be merely a permissible alternative method of calculating the commodity tax base which is available to manufacturers who apply in advance for such treatment. Article 13.2. It thus would not seem relevant to tax-base calculations for merchandise exported to the United States. Furthermore, Article 13 clearly seeks to construct a tax basis that is in principle comparable to the ex-factory wholesale price basis set forth in Article 11. The court, therefore, does not see Article 13 as a formidable obstacle.

<sup>22</sup> The court does not imply that the circumstances of sale adjustment could not be extended to include any portion of the tax differential (reflected in the home market price) generated by bona fide differences in the circumstances of sale, to the extent that such items are not included in the tax base for the exported merchandise. The theory supporting such an adjustment would be that those items are excluded from a proper price comparison between the domestic and exported merchandise, and the tax on those items is part of the cost of those items.

The admitted fact that the ITA made no special inquiry into the operation of the Japanese Commodity Tax Law raises the suspicion that the agency's professed inability to calculate the adjustment was pretextual. The court expresses no opinion as to whether the information obtained in the previous administrative proceeding is sufficient for a proper calculation of the adjustment. The court merely holds that on remand the ITA must calculate the adjustment, in the first instance, by adding to USP the amount of Japanese commodity tax determined to have been rebated or not collected upon the merchandise exported to the United States by reason of its exportation, in accordance with the requirements of § 1677a(d)(1)(C).<sup>23</sup>

#### ASSUMPTION OF FULL PASS-THROUGH

The second part of 19 U.S.C. § 1677a(d)(1)(C) provides that the amount of the adjustment may not exceed "the extent to which such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." In the challenged determination, the ITA acknowledged that this language directed it to ascertain the extent to which the commodity tax resulted in increased home market prices, and to limit by that amount the offsetting adjustment to USP. Nevertheless, the ITA assumed a full pass-through of the tax in all cases, asserting that this assumption was reasonable because "[t]o date, the Department has not developed a reasonable method for isolating the cost-price relationship for individual adjustments." In the subsequent *Korean Pianos* determination, however, the ITA concluded that the pass-through clause in § 1677a(d)(1)(C) was not intended to require the measurement of tax absorption, but instead was intended merely to facilitate harmony between the adjustment and the administration of the countervailing duty law. The issues confronting the court therefore are, first, whether the pass-through clause was intended to require the measurement of tax absorption, and if so, whether the ITA acted within its discretion by simply assuming a full pass-through.

The Japanese intervenors contend that the pass-through clause in § 1677a(d)(1)(C) does not call for the measurement of tax absorption because the statute states that the adjustment shall be made to the extent that the tax is added to "or included in" the home market price. The intervenors assert that "the total amount of the tax imposed is *always* 'included in' the resulting price." (*Matsushita et al.*, brief in opposition to Zenith's motion, at 25). This trivialized reading of the words "included in" must be rejected for the reasons that it would render the pass-through clause entirely su-

<sup>23</sup> The ITA may not perform the adjustment by increasing USP in the amount of tax paid on home market sales, as it did in the previous preliminary determination. Because this amount would clearly be excessive in cases where pre-tax dumping margins are present, it could not possibly constitute the "best information available" of what the amount of the adjustment should be.

perfluous and it conflicts with the explanation of the clause given by the House committee that drafted it. *Huffy Corp. v. United States*, 10 CIT —, Slip Op. No. 86-36 at 13-14 (Mar. 27, 1986). In support of their reading of "included in", Matsushita *et al.* advance a line of customs law valuation cases holding that certain costs such as taxes, freight charges and packing costs are "included in" the dutiable home market price. See *United States v. Zellerbach Paper Co.*, 28 C.C.P.A. 303, 309 (1941); *General Foods Corp. v. United States*, 22 Cust. Ct. 401, 405 (1949); *United States v. Passavant*, 169 U.S. 16, 22 (1898). These cases are plainly inapposite and do not in any event support the intervenors' interpretation. As the Customs Court explained in *General Foods*, *supra*, "[i]t is obvious that since the market value or price includes the cost of containers and coverings, the cost \* \* \* intended by the statute to be included is the cost to the purchaser." (emphasis in original).

The ITA presents a far more elaborate and creative interpretation of the pass-through clause in *Korean Pianos*, *supra*. The ITA therein declares that Congress' overriding purpose for amending the tax adjustment provision in the Trade Act of 1974 was to achieve "harmonized tax treatment" between the Antidumping Act and Treasury Department administration of the countervailing duty law. The ITA attempts to assimilate the pass-through clause within that purpose and concludes that Congress intended the clause to be meaningful only if some future court decision or treaty were to require Treasury to measure tax absorption in countervailing duty determinations.

The major difficulty with this "future contingent" interpretation of the pass-through clause is that not a hint of it appears in the statutory language or the legislative history. The clause is worded and explained, rather, as placing an absolute, unconditional cap on the adjustment in all cases. At bottom, the ITA must seek refuge in its view that Congress intended its expressions concerning "harmonized tax treatment" to overshadow its straight-forward explanation of the operation and purpose of the pass-through clause.

As the legislative history clearly reveals, the 1974 amendment to the tax adjustment provision consisted of two distinct changes that were enacted for independent reasons. The first change was proposed by the administration in 1973 to remedy a conflict between this provision of the Antidumping Act and the Treasury Department's long-standing practice under the countervailing duty law of treating tax rebates to foreign exporters as unfair, countervailable subsidies unless the rebated tax was "directly related" to the product being exported or components thereof. Because the Antidumping Act broadly required an addition to purchase price and exporter's sales price of the amount of any taxes imposed in the country of exportation "upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise" which have been rebated or not collected by reason of the exporta-

tion of the merchandise to the United States, the Antidumping Act arguably sanctioned foreign tax practices which Treasury regarded as unfair under the countervailing duty law. Consequently, the administration proposed that the purchase price and exporter's sales price provisions of the antidumping Act be amended to require the addition of

the amount of any taxes imposed in the country of exportation *directly upon the exported merchandise or components thereof*, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

*See Hearings Before the House Committee on Ways and Means on H.R. 6767*, 93d Cong., 1st Sess. 55-57 (1973). The administration's analysis of this change was as follows:

The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.

*Id.* at 135.

While Congress enacted the administration's proposal, it also added the qualifying clause:

*but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country for exportation.*

Pub. L. No. 93-618, Title III, Ch. 2, § 321(b), (c), 88 Stat. 2045, 2046 (1975). This second change in the tax adjustment provision was not tied to the concern for "harmonized tax treatment." Rather, it was added because Congress had become aware that indirect taxes, including taxes imposed directly on merchandise, often were not fully shifted forward to purchasers; and Congress did not want the adjustment for such a tax to increase United States price calculations by an amount greater than the price increase which the tax generated in comparison home market sales.<sup>24</sup> The House Ways and Means Committee, which drafted the pass-through clause, explained this distinct purpose in its comments on the amendment to the tax adjustment provision. The committee stated:

<sup>24</sup> As the ITA explained in *Korean Televisions I*, 49 Fed. Reg. at 7624:

The differing treatment of direct vs. indirect taxes under GATT and U.S. law arose from the assumptions that indirect taxes were fully shifted forward to purchasers while direct taxes were absorbed by sellers. By the late 1960's, however, academic literature and U.S. government reports cast doubt on the veracity of these assumptions. It is clear that the Congress in 1974 was aware of these doubts. In light of the public debate, it is only reasonable to conclude that the Congress, in its addition to [§ 1677a(d)(1)(C)] of the "but only to the extent" language, intended that we measure absorption and limit the addition to the tax passed through. This language was reiterated in *Taiwan Televisions*, 49 Fed. Reg. at 7632, and *Korean Televisions II*, 49 Fed. Reg. at 50421.

The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.

With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated. *Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.*

*H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973) (emphasis added).*

The administration also acknowledged the distinct purpose of the pass-through clause added by the House. In a statement to the Senate Finance Committee, Ambassador William D. Eberle, special representative for trade, explained:

The definitions of both "purchase price" and "exporter's sales price" are amended to harmonize the treatment of foreign tax rebates under the Antidumping Act with the standard of their treatment under the countervailing duty law. No adjustment for tax rebates to the advantage of the foreign exporter will be permitted unless the direct relationship between the tax and the exported product or its components can be demonstrated. For example, if the exported product benefited from a tax rebate on the mortgage on the plant that produced it, the rebate could not be used in the computations to reduce the dumping margin. *Moreover, an adjustment for a tax rebate will be permitted only to the extent such taxes are added to or included in the price of the merchandise when sold in the home market. To the extent the exporter absorbs indirect taxes in sales in the home market, no adjustment will be made to purchase price. The effect will be to increase the size of dumping margins under such circumstances.*

*Hearings Before the Senate Committee on Finance on H.R. 10710, 93d Cong., 2d Sess. 310 (1974) (emphasis added).*

The Senate Finance Committee adopted the House amendment, including the pass-through clause, without change, stating:

The second amendment deals with the treatment of certain types of tax rebates in computing purchase price and would provide that foreign indirect taxes, rebated or remitted upon the export of the imported merchandise in question, will be added back to purchase price only if such indirect taxes are imposed directly upon the exported product or its components, *and then only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.* The present standard for the treatment of such tax rebates or remissions which is now contained in the act is significantly broader and requires the adding back to the purchase price of a wider range of taxes, to the advantage of the foreign manufacturer, than would be allowed under the proposed amendment. The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However, the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.

*S. Rep. No. 1298*, 93d Cong., 2d Sess. 172 (1974) (emphasis added).

The language in the House report concerning "harmonized tax treatment" (which is paraphrased in the Senate report) was lifted directly from the administration's comments on its 1973 proposal containing no cap provision. Just as Congress added the cap provision to the administration's proposal, Congress added its explanation of the cap provision to the administration's comments.<sup>25</sup> The "disharmony" Congress sought to cure, therefore, was addressed by the narrowing of the adjustment to taxes "imposed \* \* \* directly upon the merchandise." Because the statute would now incorporate the "directly related" test, no margin-reducing adjustment would be made for tax rebates or remissions which Treasury regarded as unfair subsidies under the countervailing duty law. *Cf., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973) (upholding Treasury's imposition of countervailing duties based on rebate of indirect taxes not directly related to merchandise being exported).

The ITA carries the "harmonization" theme too far when it declares that Congress could not have intended a requirement under the antidumping law that tax shifting be measured because "[i]n administering the countervailing duty law, Treasury did not measure the degree of tax shifting in individual cases involving final stage indirect taxes." 50 Fed. Reg. at 37563. Apart from the fact that Congress gave no indication that it intended the pass-through clause to be meaningful only as a future possibility, the House and

<sup>25</sup> Likewise, Ambassador Eberle's explanation of the 1974 amendment before the Senate Finance Committee, quoted above, employed the identical language concerning "harmonized tax treatment" that he previously used to explain the administration's 1973 proposal before the House Ways and Means Committee. *Hearings Before the House Committee on Ways and Means on H.R. 6767*, 93d Cong., 1st Sess. 362 (1973). The only change was the addition of the language explaining of the cap provision in the subsequent statement.

Senate reports both emphasized that the committees expressed neither approval nor disapproval of Treasury's practice under the countervailing duty law. The amendment directed the administering agency to limit the antidumping law adjustment by the amount of tax shifted forward to home market purchasers; it did not direct the agency to measure tax absorption in countervailing duty determinations, or otherwise declare that the full rebate by the country of exportation of taxes directly related to the exported merchandise constitutes an unfair subsidy.

It is true that one justification advanced for Treasury's practices under the countervailing duty law concerning tax rebates has been the assumption that final stage indirect taxes are fully passed onto the purchaser whereas other taxes are absorbed by the seller. See *American Express Co. v. United States*, 472 F.2d at 1058. Those practices, however, need not rest upon assumptions concerning tax incidence. As the Supreme Court emphasized in *Zenith Radio Corp. v. United States*, 437 U.S. 433, 456-57 (1978), the practice of imposing no countervailing duty for the non-excessive rebate of indirect taxes directly related to exported merchandise may be viewed as a reasonable means of avoiding the effect of double taxation, since those indirect foreign taxes are akin to excise and sales taxes imposed on goods consumed in this country. Clearly there is no contradiction in viewing the full rebate of an indirect tax imposed directly upon exported merchandise as a fair practice under the countervailing duty law, and yet limiting the adjustment for that rebate under the antidumping law to the amount by which the tax has increased the home market price. Antidumping duties—as opposed to countervailing duties—“are imposed on the basis of differences in value, not differences in cost.” *Smith-Corona Group v. United States*, 713 F.2d 1575 (emphasis in original).

The ITA's argument in *Korean Pianos* that a meaningful interpretation of the pass-through clause in § 1677a(d)(1)(C) would conflict with the purpose of the adjustment in § 1677a(d)(1)(D) is transparently invalid. Section 1677a(d)(1)(D) provides that USP shall be increased by the amount of any countervailing duty imposed on merchandise to offset an export subsidy. The House Ways and Means Committee explained that the provision would assure that the tax rebates which subjected the merchandise to countervailing duties would not unfairly subject them to antidumping duties as well. *H.R. Rep. No. 571*, 93d Cong., 1st Sess. 70 (1973). The ITA asserts that in a combined countervailing duty and antidumping case, where USP is increased under § 1677a(d)(1)(D) by the amount of tax rebates or exemptions found to be an export subsidy, an increase to USP under § 1677a(d)(1)(C) by less than the full amount of the remaining portion (because a lesser amount was passed through to home market purchasers) would be “clearly contrary to Congress' purpose because it would lead to assessment of both antidumping and countervailing duties by virtue of the same tax re-

bates in a combined case." 50 Fed. Reg. at 37564. In fact, in the ITA's example no antidumping duties would flow from the portion of the tax rebates or exemptions found to be an export subsidy. Hence, there is no contradiction with Congress' purpose.

The House Ways and Means Committee, in the passage from its 1973 report quoted at 34-35, *ante*, could hardly have expressed its intention more clearly that the pass-through clause must be interpreted to limit the adjustment by the amount of tax *actually* passed through to home market purchasers. The report of the Senate Finance Committee states nothing to contradict or detract from that interpretation. The inescapable conclusion is that Congress intended the administering agency to perform tax absorption measurements for application in individual cases.<sup>26</sup>

Having acknowledged in the challenged determination that §1677a(d)(1)(C) directed it to measure tax absorption, the ITA considered and rejected the methodology for performing the measurement suggested by Zenith and the Unions and declared that it knew of no "reasonable" method for performing the measurement. The ITA then, without any determination of tax absorption, calculated the adjustment for the full amount of the tax, stating that "[a]bsent evidence that clearly demonstrates a manufacturer's commodity tax cost is not reflected in home market sales prices, the Department may reasonably conclude that cost and price are directly related." This statement is a fortified paraphrase of the Federal Circuit's holding in *Smith-Corona Group v. United States*, 713 F.2d at 1577 n. 26, that "absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related." The ITA's reliance on *Smith-Corona* is misplaced. *Smith-Corona* involved a challenge to an ITA regulation allowing the agency to base the circumstances of sale adjustment under §1677b(a)(4)(B) primarily on cost criteria. See 19 C.F.R. §353.15(d) (1980). In sustaining the regulation as it was applied in that case, the court emphasized that in §1677b(a)(4)(B) Congress expressly granted discretion to the administering authority to determine the extent of the adjustment. Hence, in the absence of evidence to the contrary, the statute permitted the ITA to assume a direct relationship between cost and price. 713 F.2d at 1575-77. In §1677a(d)(1)(C), by contrast, Congress has inserted the express requirement that the adjustment be made "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."<sup>27</sup> In adding

<sup>26</sup> Astonishingly, in *Korean Pianos*, after reciting the referenced passages from the House and Senate committee reports, the ITA remarks:

[N]othing in either the statute or the above-quoted legislative history requires that the Department measure tax absorption in individual cases. Because Congress was aware of the problems inherent in measuring tax absorption, if Congress truly intended that the Department embark upon such a hazardous undertaking, it surely would have made its intent more clear.

50 Fed. Reg. at 37563.

<sup>27</sup> The applicable ITA regulation, 19 C.F.R. §353.10(d)(1)(iii), incorporates the precise language of the pass-through clause. See note 16, *ante*. In contrast to the circumstances of sale adjustment regulation, no regulation purports to authorize reliance on manufacturer's cost to determine the amount of tax added to or included in the home market price.

this requirement, Congress explained that "[t]o the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased." *H.R. Rep. 571, supra*, at 69. To permit the ITA to assume, without any evidentiary basis, that home market price always reflects the full amount of such taxes would effectively render the pass-through clause a nullity and would defeat the express will of Congress. As Judge Carman of this court recently remarked in *Huffy Corp. v. United States, supra* at 14:

We must conclude that Congress recognized that not all taxes are passed on to the home market, and therefore required some showing that such a tax is passed on before its rebate could be the source of an adjustment. To support an adjustment for a tax rebate there must be substantial evidence in the record to support the conclusion that the tax was passed on to the home market.

(footnote omitted).<sup>28</sup> Decidedly, evidence revealing only the manufacturers' commodity tax costs does not constitute substantial evidence.<sup>29</sup>

Although § 1677a(d)(1)(C) requires the ITA to measure actual tax absorption, it leaves the precise method of performing this measurement to the discretion of the agency. However, the ITA may not place the burden on a private party to advance a method of measuring tax absorption which the ITA deems acceptable, in failure of which it performs no measurement whatsoever. Rather, the agency must find a methodology for measuring absorption which it considers satisfactory and must base its measurements upon substantial evidence.

The court leaves open whether the simple method of subtracting after-invoice discounts and rebates from gross invoice prices, suggested by Zenith and the Unions below, is sufficient, or whether an econometric approach is required. In prior determinations, the ITA has declared that an econometric measurement of tax absorption is "impossible", explaining:

The degree of [tax] shifting depends upon, among other things, the demand for the product, actions of the monetary authori-

<sup>28</sup> Although this holding in *Huffy* was not essential to the court's decision, the court finds Judge Carman's reasoning particularly persuasive.

<sup>29</sup> While the *Smith-Corona* holding permitting cost-based "circumstances of sale" adjustments is manifestly inapplicable to the foreign tax adjustment under § 1677a(d)(1)(C), the instant case is also distinguishable from *Smith-Corona* with respect to the evidence presented. Whereas the record in *Smith-Corona* contained no factual evidence tending to prove or disprove a direct cost-price relationship, the record below reveals numerous instances in which the sum of the commodity tax price plus the amount of the commodity tax exceeded the final price actually paid by home market purchasers (after receiving discounts, rebates and other allowances from the manufacturer). See R. Doc. 554 PUBLIC at 6-7. The evidence of these price discrepancies constitutes at least a *prima facie* showing that manufacturers' commodity tax costs were not fully reflected in home market sales prices. Accordingly, even if the *Smith-Corona* holding were somehow applicable, it would seem, in light of the caveat in footnote 26 of that opinion, that the ITA could not merely assume in the face of such a showing, with nothing further, that the tax was fully passed through to home market purchasers. But see *Timken Co. v. United States*, 10 CIT —, Slip Op. 86-17, at 56-61 (Feb. 20, 1976) (upholding cost-based circumstances of sale adjustment against evidentiary challenge).

ties, the stage of the business cycle and the degree of competition among the producers of the product. In short, the Department would have to know the shape and position of the supply and demand curves for a product in the absence of tax to determine the price that would then exist. The Department would have to know these facts for each point in time at which a sale, chosen for comparison to a U.S. sale, occurred.

*Korean Televisions I*, 49 Fed. Reg. at 7624; *Taiwan Televisions*, 49 Fed. Reg. at 7632; *Korean Televisions II*, 49 Fed. Reg. at 50421. Plaintiffs have persuasively argued in their briefs before the court that the ITA has significantly overstated what is required; that the agency would only need estimates of the normal long-run elasticities of supply and demand for television sets in Japan during a time period including the one under review.<sup>30</sup> They point out that generally accepted economic theory holds that "the burden of a tax is divided between buyer and seller as the ratio of elasticity of supply to elasticity of demand in the relevant range of demand and supply schedules." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 272 (4th ed. 1984).<sup>31</sup> In any event, whatever the measurement entails it is well established that an administrative agency lacks the authority to disregard a statutory obligation merely because the tasks required are difficult or complicated. See, e.g., *United States v. H. Rosenthal Co.*, *supra*; *United States ex rel. Kansas City Southern Ry Co. v. ICC*, 252 U.S. 178, 185-88 (1920); *Continental Steel Co. v. United States*, 9 CIT —, 614 F. Supp. 548, 554 (1985). *Appeal docketed*, No. 85-2805 (Fed. Cir. Sept. 24, 1985).

The court lastly turns to the final argument presented by the ITA in *Korean Pianos*. The petitioners therein had urged that the ITA "calculate the relative tax burdens of buyers and sellers in the home market by measuring the relative elasticity of supply and demand for pianos in Korea." 50 Fed. Reg. at 37561. This is the econometric approach discussed above. The ITA's final response to this proposal was as follows:

Finally, the Department can perceive no economic justification for adjusting the home market-U.S. price differential by anything less than the actual amount of final stage taxes paid by the producers. We believe that the antidumping duty law is intended to remedy situations in which a foreign producer accepts a lesser return on his U.S. sales than on his home market sales. Where the costs of production and sale are identical in both markets, any difference in price will represent a difference in return. Where the costs of production and sale

<sup>30</sup> There is a substantial body of literature on how demand and supply elasticities may be measured. See, e.g., R. Stern, et al., *Price Elasticities in International Trade: An Annotated Bibliograph* (1976); *The Theory and Empirical Analysis of Production* (M. Brown ed. 1967). Indeed, the International Trade Commission has estimated demand elasticities for several industries. See Office of Economic Research, USITC, *Foreign Trade Elasticities for Twenty Industries* (Jan. 1975).

<sup>31</sup> The same authors conclude (at 273) that "a product tax tends to fall on the consumer if demand is inelastic while supply is elastic, and on the producer when the opposite holds." Because the demand for television sets in Japan would naturally show some degree of elasticity, the ITA's assumption that the commodity tax is fully shifted forward to purchasers in all cases is unrealistic and unreasonable.

differ between markets, any difference in price will represent a difference in return only after the price differential has been adjusted by the net amount of the differences in cost. A difference in final stage tax liability is just as much a difference in the cost of production and sale as any difference in material costs or credit expenses. Therefore, just as we have always adjusted the price differential by the amount of any difference in material costs and credit expenses, we believe we should also make such an adjustment for any difference in final stage tax liability.

*Id.* at 37564. Whereas the *Smith-Corona* decision sustained the ITA's discretion to assume as a practical matter in limited situations that differences in manufacturer's costs reflect differences in price or value, the ITA now brazenly leaps to a purely cost-based view of the antidumping law, wherein the effect of cost on price is not relevant even in principle. While this may be the antidumping law Commerce officials would like to see, it is not the antidumping law presently in place. As the Federal Circuit emphasized at length in *Smith-Corona*:

The language of the statute \* \* \* specifies that adjustments are to be made on the basis of differences in *price* or *value*. This approach is followed consistently throughout the antidumping law. Cost is generally relied upon only when value cannot readily be determined from price.

Antidumping duties are imposed on the basis of differences in value, *not* differences in cost. \* \* \* Thus, cost criteria alone will not redress the full margin of dumping to which Congress sought to attach an antidumping duty. Value *must* be considered under the statute.

\* \* \*

The legislative history reflects a long felt and understandable congressional distrust of *cost* as the basis for the computation of dumping duties.

\* \* \*

The Secretary may not \* \* \* rely on cost to *the exclusion of* its effect on value.

713 F.2d at 1575-77 (emphasis in original).

It is the duty of the ITA to enforce and administer the provisions of the antidumping law as they have been written by Congress and interpreted by the courts. That Congress intentionally chose to base the calculation of dumping margins on differences in price or value, not differences in cost, is well settled. In 19 U.S.C. § 1677a(d)(1)(C), Congress' addition of the pass-through clause has foreclosed the administrative option of blindly assuming a full pass-through of the adjusted-for tax. Accordingly, on remand, after determining the amount of Japanese commodity tax rebated or not collected upon televisions exported to the United States, the ITA must determine the amount of commodity tax added to or included

in the home market price in comparison sales. These determinations must be based upon substantial evidence. The ITA must then calculate the adjustment in each case in the lesser of these two amounts.

### CONCLUSION

To summarize, the ITA abused its discretion by failing to calculate the foreign indirect tax adjustment, provided in 19 U.S.C. § 1677a(d)(1)(C), as an addition to USP in the amount of Japanese commodity tax rebated or not collected upon the merchandise exported to the United States. The ITA further abused its discretion by failing to measure tax absorption in home market sales so as to limit the adjustment by the amount of tax passed through to home market purchasers. The agency's conclusion that a full pass-through occurred to in all cases is not supported by substantial evidence. Therefore, these actions are remanded to the ITA for recalculation of the adjustment in a manner consistent with this opinion.

In accordance with the foregoing, it is ORDERED:

1. That plaintiffs' respective motions, filed pursuant to Rule 56.1 of this court, are hereby granted.

2. That the cross-motion of defendant, United States, for remand is hereby granted in part in accordance with the terms of the foregoing opinion.

3. That the Final Results challenged herein are hereby reversed with respect to the ITA's determination of the adjustment for the Japanese commodity tax under 19 U.S.C. § 1677a(d)(1)(C).

4. That these actions are hereby remanded to the ITA for recalculation of the said adjustment in a manner consistent with the foregoing opinion.

5. That the ITA shall report the results of its recalculations and redeterminations to this court within 90 days after the date of entry of this order.

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(Slip Op. 86-44)

UNITED STATES, PLAINTIFF *v.* STANLEY GORDON, DEFENDANT

Court No. 84-1-00074

### OPINION

(Decided April 25, 1986)

[Plaintiff's motion to compel discovery granted in part; motion for sanctions and to deem certain matters admitted denied.]

*Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch and *Velta A. Melnbrencis, Esq.*, Civil Division, Department of Justice, for plaintiff.

*Fronfield S. deFuria (Leo A. Hackett, Esq.)*, for defendant.

**RESTANI, Judge:** Plaintiff-United States alleges that defendant-Stanley Gordon unlawfully introduced an automobile, attempted to introduce a second automobile, and aided or abetted in the introduction of a third automobile, into the commerce of the United States,<sup>1</sup> in violation of 19 U.S.C. §§ 1481, 1484, 1485 and 1592.<sup>2</sup> Accordingly, plaintiff seeks to have judgment entered against defendant for monetary penalties as provided for in 19 U.S.C. § 1592 (1982).<sup>3</sup> An action is also apparently pending in federal district court, in which plaintiff seeks to have a penalty imposed on this same defendant for his involvement in these same allegedly unlawful importations and attempted importation, pursuant to 19 U.S.C. § 1595a(b).<sup>4</sup> In connection with discovery in the case at bar, plaintiff has served defendant with a request for production of documents and things and a request for admissions, and has attempted to depose defendant. Defendant, asserting the fifth amendment privilege against compulsory self-incrimination, has failed to comply with the request for the production, has refused to respond

<sup>1</sup>The three automobiles in question have been identified by plaintiff, respectively, as a Morgan 4/4, chassis No. B3352, manufactured in 1974; a Morgan Plus 8, chassis No. R8300, manufactured in 1977; and a Morgan automobile, chassis No. B3977, manufactured in 1977.

<sup>2</sup>Briefly, each automobile was allegedly fitted with a plaque falsely fixing the year of manufacture as 1966, which allegedly facilitated importation without compliance with certain requirements of the National Traffic and Motor Safety Act of 1966, the Clean Air Act, and pertinent regulations implementing the two acts.

<sup>3</sup>19 U.S.C. § 1592 (1982) provides in relevant part:

(a) Prohibition

(1) General Rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

(c) Maximum penalties

(1) Fraud

A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.

(2) Gross negligence

A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) four times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence

A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) two times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

<sup>4</sup>19 U.S.C. § 1595a (1982) reads as follows:

§ 1595a. Forfeitures and other penalties

(a) Importation, removal, etc. contrary to laws of the United States

Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unloading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

(b) Penalty for aiding unlawful importation

Every person who directs, assists financially or otherwise, or is in any way concerned in any unlawfully activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

substantively to the request for admissions and, beyond stating his present residence and address, has apparently refused to provide substantive answers to plaintiff's deposition questions. Before the court at this time is plaintiff's motion (1) to order defendant to (a) respond fully to plaintiff's first request for production; (b) respond fully to all questions posed by plaintiff at any deposition taken of the defendant; (c) reimburse plaintiff for actual out-of-pocket expenses in connection with the above-mentioned deposition and (2) to deem admitted the matters set forth in plaintiff's first request for admissions. The first issue to be addressed here is to what extent the fifth amendment privilege against self-incrimination may be raised in an action for penalties under 19 U.S.C. § 1592.

The fifth amendment to the United States Constitution states, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." Congress intended that section 1592 provide a civil remedial sanction. See *United States v. Murray*, 5 CIT 102, 105-06, 561 F. Supp. 448, 453 (1983); *United States v. Alcatex, Inc.*, 328 F. Supp. 129, 132-33 (S.D.N.Y. 1981). Defendant here may still be within the scope of the fifth amendment's self-incrimination clause, however, because the Supreme Court has interpreted the privilege against compulsory self-incrimination as applying in actions other than those labeled as criminal prosecutions. Constitutional protections afforded criminal defendants may apply, despite Congress' intent to create a civil remedy, if the applicable sanctions are "so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248-49 (citing *Flemming v. Nestor*, 363 U.S. 603, 616-21 (1960)), *reh'g denied*, 448 U.S. 916 (1980). In addition, the privilege against compulsory self-incrimination may apply in an action that, although civil in form and not so punitive as to give rise to all criminal procedural safeguards, is "quasi-criminal" in nature. *Ward*, 448 U.S. at 251-54; see *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971); *Lees v. United States*, 150 U.S. 476, 480-81 (1893); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886). Further, the privilege may apply even in a strictly civil (non "quasi-criminal") action where the testimony sought could subject the person questioned to criminal liability. See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)). In any case, the privilege may be invoked only if the threat of prosecution is "substantial and 'real,' and not merely trifling or imaginary." *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citing *Rogers v. United States*, 340 U.S. 367, 374, *reh'g denied*, 341 U.S. 912 (1951); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896)).

This court has previously concluded that section 1592 is not "so punitive as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'" *Murray*, 5 CIT at 106, 561 F. Supp. at 453 (double jeopardy clause of fifth amendment not applicable in section 1592 action) (quoting *Rex Trailer Co. v. United*

*States*, 350 U.S. 148, 154 (1956)).<sup>5</sup> Thus, defendant is clearly not entitled to the litany of protections afforded criminal defendants. A determination that section 1592 is "quasi-criminal," however, would place defendant within the scope of the fifth amendment's privilege against compulsory self-incrimination. See *Ward*, 448 U.S. at 253-54 (considering whether action was so far criminal in nature to give rise to fifth amendment protection against compulsory self-incrimination despite inapplicability of such protections as those of sixth amendment and double jeopardy clause of fifth amendment) (citing *United States v. Regan*, 232 U.S. 37, 50 (1914) (fifth amendment privilege against compulsory self-incrimination broader than protections of article III and of sixth amendment)).

Defendant relies in large part on *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), wherein the Supreme Court held the fifth amendment privilege against compulsory self-incrimination applicable in a civil forfeiture action. The statute at issue in *U.S. Coin*, 26 U.S.C. § 7302, provides that it is unlawful to possess property intended for use in violating provisions of the internal revenue laws and that "no property rights shall exist in any such property." A forfeiture action was instituted, pursuant to this statute, following defendant's conviction for both failing to register as a gambler with the Internal Revenue Service and failing to pay the related gambling tax. The Court stated that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes." 401 U.S. at 718 (quoting, with emphasis added, *Boyd v. United States*, 116 U.S. 616, 634 (1886) (privilege against self-incrimination applicable in customs forfeiture action.)) In support of the conclusion that the statute in question did in fact target for forfeiture an individual's property "by reason of offences committed by him," the Court noted that remission was provided for in accordance with the customs laws. *U.S. Coin*, U.S. at 721 & n.8 (citing 26 U.S.C. § 7327). Thus, an "innocent owner" could seek remission from the Secretary of Treasury by proving that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law . . . ." *Id.* at 721 (quoting 19 U.S.C. § 1618). The Court was convinced, therefore, that the forfeiture statute in question was "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *Id.* at 721-22. As such, defendant could invoke the fifth amendment privilege against compelled self-incrimination.

The statutory provision for administrative remission referred to in *U.S. Coin* appears, along with section 1592, in Chapter 4 of Title

<sup>5</sup> *Murray* was decided under the language of section 1592 in effect prior to its amendment in 1978. Pub. L. No. 95-410, Title I, § 110(a), 92 Stat. 888, 893-97 (1978) (penalty of forfeiture replaced by varying monetary penalties). This amendment, however, is not of the type that would "transform" section 1592 into a criminal statute. If anything, the change makes section 1592 more akin to a purely civil statute. See *infra* discussion.

19 of the United States Code and is applicable to the imposition of a penalty under section 1592.<sup>6</sup> There are, however, several factors which distinguish the instant case from *U.S. Coin*. These distinguishing features become evident when *U.S. Coin* is read in the light of the Court's analysis in *United States v. Ward*, 448 U.S. 242, *reh'g denied*, 448 U.S. 916 (1980).

After determining that the statute in *Ward* was neither intended to impose a criminal sanction nor "so punitive either in purpose or effect to negate that intention," 448 U.S. at 248-249, the Court went on to consider whether the statute was "quasi-criminal," thereby affording defendant the privilege against compulsory self-incrimination.<sup>7</sup> In this analysis, the *Ward* Court first noted three factors distinguishing the case from *Boyd v. United States*, 116 U.S. 616 (1886). First, the penalty of forfeiture in *Boyd* "had absolutely no correlation to any damages sustained by society or the cost of enforcing the law," 448 U.S. at 254, whereas the monetary penalty in *Ward* was "much more analogous to traditional civil damages." *Id.* Second, as compared to the forfeiture provision in *Boyd*, which was part of the same statutory section as the provision for imprisonment, the civil and criminal remedies in *Ward* were in separate statutes enacted seventy years apart. *Id.* Third, while in *Boyd* there was the danger that the appellant's testimony could prejudice him in future criminal proceedings, the statute in *Ward* specifically barred the use of statutorily mandated disclosures from use in any future criminal actions, other than in actions for perjury or for giving a false statement. *Id.* Finally, and of greater significance to the *Ward* Court than the three factors distinguishing *Ward* from *Boyd*, the Court found "overwhelming evidence" of a Congressional intent to create "a penalty civil in all respects and quite weak evidence of any countervailing purpose or effect." *Id.* The Court declined, therefore, to extend to respondent the fifth amendment privilege against compulsory self-incrimination.

The distinctions made by the Supreme Court of *Ward* and *Boyd* are helpful in the case at bar. First, in 1978, Congress changed the remedy for violation of section 1592 from one of forfeiture to imposition of monetary penalties. Pub. L. No. 95-410, Title I, § 110(a), 92 Stat. 888, 893-97 (1978); see S. Rep. No. 778, 95th Cong., 2nd Sess. 18-19, reprinted in 1978 U.S. Code Cong. & Ad. News 2211, 2230-31; *United States v. One Red Lamborghini and One Black Lamborghini*, 10 CIT —, 625 F. Supp. 986, 989 & n.6 (1986), appeal docketed, 86-1015 (Fed. Cir. Mar. 17, 1986). Thus, like the statute in *Ward*, section 1592 now more closely resembles "traditional civil dam-

<sup>6</sup> In addition to its applicability in *U.S. Coin*, remission under § 1618 may be sought by a person interested in property "seized under the provisions of this chapter, [chapter 4—Tariff Act of 1930]" or by a person "who has incurred, or is alleged to have incurred, any fine or penalty thereunder" \* \* \*. 19 U.S.C. § 1618 (1982 & Supp. II 1984).

<sup>7</sup> Under consideration in *Ward* was § 311(b)(6) of the Federal Water Pollution Control Act. 33 U.S.C. § 1321(b)(6). This section, which has since been amended, provided that "[a]ny owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of [the act] shall be assessed a civil penalty \* \* \* of not more than \$5,000 for each offense." *Id.*

ages" than do statutes, like those in *U.S. Coin* and *Boyd*, which provide for forfeiture. That the concerned statute provides for a monetary penalty rather than for forfeiture, however, is not enough to completely distinguish the holdings of *U.S. Coin* and *Boyd*. See *Lees v. United States*, 150 U.S. 476 (1893) (fifth amendment privilege against self-incrimination applicable under statute imposing fixed monetary penalty). Second, like *Ward*, and unlike both *Boyd* and *U.S. Coin*, the criminal and civil remedies here are contained in separate statutes. This too, as in *Ward*, is evidence that the civil penalty is not "quasi-criminal." As to the third factor, unlike the statute in *Ward*, section 1592 contains no use immunity to prevent a defendant from prejudicing himself with respect to a future criminal prosecution. Nonetheless, the court places little emphasis on this fact, because the threat of future criminal prosecution may justify assertion of the fifth amendment privilege against self-incrimination even in a strictly civil proceeding. See, e.g., *Lefkowitz*, 414 U.S. at 77. The question of whether section 1592 is "quasi-criminal" is separate and apart from the issue of whether defendant may incriminate himself under other criminal statutes.

The factor given most weight in *Ward*, Congress' intent to create a civil penalty, as opposed to the statute's "countervailing punitive purpose or effect," 448 U.S. at 254 (emphasis added), is instructive in the case at bar. Section 1592 can be said to have, to some degree, a punitive effect. First, the penalty imposed under section 1592 differs with the degree of scienter or culpability of the defendant. See *supra* note 3. This link between the degree of culpability and the penalty imposed is essential to retribution, a principle of punishment rather than of civil damages. See *Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 338 (1983) (citing I. Kant, *The Philosophy of Law* 194-98 (W. Hastie Trans. 1887); C.W.K. Mundle, *Punishment and Desert in Philosophy of Punishment* 65, 71-74 (H. Acton ed. 1969)); cf. *Ward*, 448 U.S. at 256-57 (Blackmun, J., concurring) (in deciding whether to classify statute as "quasi-criminal," discounted importance of scienter as factor because it was not mentioned on face of statute). In addition, a defendant in a section 1592 action may be forced to pay the greatest penalty applicable under that provision even if his unlawful conduct did not result in the loss of any revenue to the United States. See 19 U.S.C. § 1592(c) (1982) (*supra* note 3) (penalty for fraud may equal domestic value of merchandise regardless of duties lost). Furthermore, under 19 U.S.C. § 1592(d) (1982), any actual duties owing remain owing, whether or not a penalty is assessed.<sup>8</sup> Compare with *Ward*, 448 U.S. at 256 (Blackmun, J., concur-

<sup>8</sup> The court notes, however, that punitive damages may be assessed in some purely civil suits in addition to compensatory damages, and that the amount of purely civil punitive damages, do not necessarily relate to the amount of injury suffered. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages not intended to compensate injured party but rather to punish tortfeasor and deter similar conduct) (citing Restatement (Second) of Torts, § 908 (1979); W. Prosser, *Law of Torts* 9-10 (4th ed. 1971)).

ring) (civil and compensatory nature of statute evidence by provision that collected assessments be placed in revolving fund used to defray cleanup expenses); see Wheeler, 69 Va. L. Rev. at 338 (civil penalty based on harm caused is less likely to have punitive purpose than civil penalty based on culpability). The statute in question, therefore, appears to have, at least in part, a punitive "effect," whether or not Congress had that "purpose" in mind.

On the other hand, section 1592 has a remedial effect as well. Even prior to the 1978 amendment, this court pointed to the various costs of enforcing section 1592 and to the injury to the government of frustration of its policies through violations of the customs laws, and therefore characterized section 1592 forfeiture as a remedial measure akin to liquidated damages. *Murray*, 5 CIT at 106-07, 561 F. Supp. at 453 (quoting *Alcatex*, 328 F. Supp. at 132-33). This remedial function was bolstered by the amendment of section 1592 which, as noted, now links, under certain circumstances, the penalty imposed to the lawful duties of which the United States was deprived. That is, the maximum penalties vary in amount from the domestic value of the merchandise (for fraudulent violations), to the lesser of either a percentage of the domestic value of the merchandise or a multiple of the duties lost (for gross negligence and negligence).<sup>9</sup> 19 U.S.C. § 1592(c) (1982) (*supra* note 3).

Further, the legislative history makes clear that an important motivation for amending section 1592 was Congress' desire to alleviate the harsh consequences of the forfeiture penalty. The Senate report notes that a problem with the former section 1592 was that once having found a violation, the courts had no alternative but to order forfeiture. This penalty was thought too severe in many cases. S. Rep. No. 778 at 2, 1978 U.S. Code Cong. & Ad. News at 2213. Thus, the trier of fact may award penalties in an amount far below the maximum allowable, presumably based on any rational reason including the degree of damages sustained. By replacing forfeiture with varying monetary penalties, which are subject to reduction by the trier of fact and which, to varying degrees, will relate to damages, Congress has made section 1592 largely remedial, rather than "punitive," both in "purpose" and "effect."<sup>10</sup>

As in *Ward*, there is strong evidence of Congressional intent to create a civil remedial penalty and a relatively weak punitive purpose or effect. When coupled with the relevant distinctions made in

<sup>9</sup> If a grossly negligent or negligent violation of the statute has no impact on the assessment of duties, the maximum penalty is measured by a percent of the dutiable value of the merchandise. 19 U.S.C. §§ 1592(c)(2), (3) (1982) (*supra* note 3).

<sup>10</sup> The remedial nature of § 1592 is also evidenced by its authorization, in limited circumstances, of seizure under subsection (c)(5). Seizure of the merchandise in question may be effected if there is reasonable cause to believe that a person has violated § 1592(a) and is insolvent or beyond the jurisdiction of the United States, or if other compelling reasons exist. If the merchandise is of the type which may be released into commerce, it is to be returned upon the making of a deposit. 19 U.S.C. § 1592(c)(5) (1982). Under this same provision, if the fine levied under § 1592(c) is not paid within the time specified by law the property may be "forfeited", although 19 U.S.C. § 1613(b) (1982 & Supp II 1984) calls for payback, after sale of such "forfeited" property, of any proceeds in excess of the penalty assessed. Thus, seizure and "forfeiture" here may be seen as part of the overall remedial scheme of § 1592, much like prejudgment attachment in other civil suits, rather than as a form of punishment for criminal conduct.

*Ward* of the statute at issue in *Boyd*, which distinctions have also been made with respect to section 1592, the court concludes that section 1592 is not "quasi-criminal."<sup>11</sup> Thus, defendant here can invoke the fifth amendment privilege against compulsory self-incrimination only if compelled testimony in the case at bar would threaten him with criminal prosecution in a separate action.

It is apparent that the only action in which defendant's testimony in the case at bar might be used against him is the suit, evidently pending in federal district court, brought by the United States under 19 U.S.C. § 1592a(b) (1982).<sup>12</sup> (*supra* note 4). As plaintiff points out, the legislative history to section 1595a(b) indicates that this provision was intended as a civil penalty. See S. Rep. No. 2326, 83rd Cong. 2d Sess. 6-7, reprinted in 1954 U.S. Code Cong. & Ad. News 3900, 3905-06 (eliminating criminal sanction as "practical duplication" of 18 U.S.C. § 545). The court's analysis of 19 U.S.C. § 1592 earlier in this opinion makes clear, however, that this does not end the court's inquiry. The court must determine whether the statute is "quasi-criminal" for fifth amendment self-incrimination purposes. See *Ward*, 448 U.S. at 253-54. Obviously, if defendant has a fifth amendment privilege applicable to testimony sought to be used against him in a section 1595a(b) action, absent use immunity, that privilege would be meaningless if he could be forced to surrender it here.

In upholding the constitutionality of a forfeiture action brought pursuant to subsection (a) of section 1595a, the Court of Claims noted that this subsection triggers fourth amendment protections and the fifth amendment privilege against compelled self-incrimination. *Doherty v. United States*, 500 F.2d 540, 544 (Ct. Cl. 1974). Plaintiff challenges the applicability of this statement in *Doherty* to the case at bar on two grounds, neither of which the court finds persuasive. First, plaintiff notes that the privilege against self-incrimination was not raised in *Doherty* and, thus, that the court's statement regarding the privilege is dicta. Although this characterization may be technically correct, the accuracy of the court's statement is supported by Supreme Court precedent. In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), the Court was confronted with a statute which, although in the context of a liquor control law, like section 1595a(a), called for the forfeiture of vehicles used to effect the illegal transportation of articles. It was clear to the Court that forfeiture under the law in question was "a pen-

<sup>11</sup> One might argue that § 1592 should be analyzed in a piecemeal fashion, and that the fraud provisions are "quasi-criminal," while the negligence provisions are not. The court believes that, in order to determine Congressional intent, the statute must be viewed as a whole, inasmuch as Congress enacted the provisions together as part of one scheme for assessing civil penalties in certain circumstances.

<sup>12</sup> The court notes that defendant's alleged conduct is apparently actionable as a criminal offense under 18 U.S.C. § 545 (1982). Defendant has entered into a plea bargain agreement covering criminal charges brought under § 545 for two of the importations in question, however, and a § 545 action for the third importation would be barred by the statute of limitations. See 18 U.S.C. § 3282 (1982). Thus, defendant is in no danger of further prosecution under § 545 and, therefore, cannot invoke the fifth amendment privilege based on potential prosecution under that statute. Civil forfeiture under § 545 might be considered "quasi-criminal", but the statute of limitations has run on such an action, as well. 19 U.S.C. § 1621 (1982).

alty for the criminal offense." *Id.* at 701. Following the lead of *Boyd, supra*, the Court held that the law was "quasi-criminal" and, as such, the exclusionary rule barred the admissibility, in the forfeiture proceedings, of evidence seized in violation of the fourth amendment. *Id.* at 700-02. Therefore, it is evident that *Doherty's* characterization of section 1595a(a), with respect to the fourth amendment, is accurate, and the court will impose no narrower construction on the fifth amendment privilege against compulsory self-incrimination. See *Boyd*, 116 U.S. at 634 (fourth amendment protections and fifth amendment self-incrimination clause found applicable to forfeiture action). Therefore, the court follows the view expressed in *Doherty* that the fifth amendment self-incrimination clause applies to section 1595a(a).

Plaintiff's second challenge to the relevance of *Doherty* to the case at bar is that the action currently pending in district court against defendant is for a monetary penalty under section 1595a(b) rather than for forfeiture under section 1595a(a). Plaintiff argues, in essence, that the applicability of the self-incrimination clause to section 1595a(a) would be based on the propositions of law governing forfeitures, and, therefore, has no bearing on an action for a monetary penalty under section 1595a(b). As noted earlier, however, the Supreme Court has held the fifth amendment privilege against compulsory self-incrimination applicable to a statute calling for a fixed monetary penalty. *Lees v. United States*, 150 U.S. 476 (1893).<sup>13</sup> Thus, that section 1595a(a) provides for forfeiture while section 1595a(b) provides for a monetary penalty is insufficient to distinguish the two provisions for purposes of applying the privilege against compulsory self-incrimination. Further, the relative severity of the respective penalties does not distinguish these two subsections as to the fifth amendment privilege. In fact, there is simply no way to tell, apart from the facts of a given case, whether the value of that which is forfeited under section 1595a(a) (anything from a donkey to a jet) will be greater or less than the monetary penalty imposed under section 1595a(b), which is determined exclusively by the value of the imported article(s). Furthermore, unlike section 1592, there is no provision for imposition of a lesser penalty by the court or jury. Thus, the trier of fact is precluded from considering the amount of damage suffered. Therefore, there appears to be no greater likelihood that the penalty imposed under section 1595a(b) will more closely approximate the costs of enforcement and the damage inflicted than will the penalty imposed under section 1595a(a).<sup>14</sup> Furthermore, the two subsections

<sup>13</sup> The Supreme Court's adherence to this view is supported by its opinion in *Ward*. Although the *Ward* Court held the privilege inapplicable to the statute in question in that case, its reasoning went far beyond an assertion that the statute called for a monetary penalty rather than for forfeiture. 448 U.S. at 253-54 (see *supra* discussion).

<sup>14</sup> The court notes that there is a difference between the relative scope of these sections. Section 1595a(a) calls for the forfeiture of that which is used in any way to import, conceal, harbor, etc., articles unlawfully introduced into the United States. 19 U.S.C. § 1595a(a) (1982) (*supra* note 4). By comparison, section 1595a(b) imposes a mon-

*Continued*

of section 1595a work together to punish those involved in illegal importations. Thus, apparently, one who hides illegal merchandise in a vehicle could forfeit the vehicle and be liable for the value of the hidden merchandise as well. Both provisions are part of a single statutory scheme intended to address illegal conduct.

Finally, the conclusion reached in *U.S. Coin* that the statute in question imposed a penalty "'by reason of offences committed by [an individual],'" 401 U.S. at 718 (quoting, with emphasis added, *Boyd*, 116 U.S. 616, 634 (1886)), seems equally fitting to both subsections (a) and (b) of section 1595a. This conclusion is supported by the fact that, presumably, administrative remission under 19 U.S.C. § 1618 applies to section 1595a, where lesser degrees of scienter are involved, just as it applied to the statute in question in *U.S. Coin*. See *supra* note 5 and accompanying text. Unlike section 1592, section 1595a(b) raises no considerations which lessen the impact of this factor. The court is unable to discern any meaningful distinctions between the statute at issue in *U.S. Coin* and section 1595a, or between subsections (a) and (b) of section 1595a, with regard to the fifth amendment privilege against self-incrimination. The court must conclude, therefore, that section 1595a(b), like section 1595a(a), is a "quasi-criminal" sanction rather than a strictly civil remedial measure. As such, to the extent that defendant's testimony in the section 1592 action at bar presents a real and appreciable threat of prosecution under 19 U.S.C. § 1595a(b) (1982), defendant may invoke the privilege against compulsory self-incrimination.<sup>15</sup>

Plaintiff objects that, even if the fifth amendment privilege may be invoked in the case at bar, defendant has failed to raise it properly. A blanket refusal to comply with a request for production, to respond to questions raised at a deposition, or to respond to a request for admissions, is unacceptable. See *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974). Rather, "[t]he privilege must be asserted with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify." *Id.* (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). Accordingly, the court directs defendant to specify, as to each question or request to which he objects, "the grounds for objection, and, wherever possible without self-incrimination, to what degree a responsive answer might have a tendency to incriminate [him]." *Gatoi, Inc. v. Forest Hill State Bank*, 104 F.R.D. 580, 582 (D. Md. 1985)

etary penalty, equal to the value of the imported article(s), on one who aids, or is in any way involved, in the unlawful conduct described in section 1595a(a). 19 U.S.C. § 1595a(b) (1982) (*supra* note 4). Certainly this difference in scope cannot be the basis for holding the self-incrimination clause inapplicable to section 1595a(b), the broader of the two provisions.

<sup>15</sup> The court finds it premature to address what inferences might be drawn in the § 1592 action at bar from defendant's assertion of the fifth amendment privilege in this strictly civil action. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (prison disciplinary proceeding) (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961) (fifth amendment does not preclude negative inference "where the privilege is claimed by a party to a civil cause" (emphasis omitted))).

(citing *de Antonio v. Solomon*, 41 F.R.D. 447, 449-50 (D. Mass. 1966)). Plaintiff may then file a motion to compel discovery if there is any further dispute as to defendant's right to invoke the privilege against self-incrimination, in the light of this court's holding regarding the limited applicability of the privilege to the case at bar.

Finally, plaintiff has moved for reimbursement of expenses incurred in the unsuccessful attempt to depose defendant and to have deemed admitted the matters set forth in plaintiff's first request for admissions. Although defendant has overstated the scope of the fifth amendment privilege and has invoked the privilege in an improper form, his conduct, thus far, does not warrant these sanctions.

In conclusion, defendant may invoke the fifth amendment privilege against compulsory self-incrimination in this section 1592 action only to the extent that his testimony presents a real and appreciable threat of prosecution under section 1595a(b). In addition, to properly invoke the fifth amendment privilege, defendant must raise it in the manner described in this opinion.

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(Slip Op. 86-45)

CARLISLE TIRE & RUBBER Co., DIVISION OF CARLISLE CORP., ET AL.,  
PLAINTIFFS v. UNITED STATES, DEFENDANT, DONG-AH TIRE IND.  
Co., LTD., DEFENDANT-INTERVENOR, HEUNG-AH TIRE IND. Co.,  
LTD., DEFENDANT-INTERVENOR

Court No. 84-7-01058

Before DiCARLO, Judge.

Plaintiffs move to set aside the Court's order substantially affirming a Department of Commerce determination that inner tubes from Korea were not sold at less than fair value. Plaintiffs allege that Commerce used conflicting weights to make merchandise and drawback adjustments. Defendant says weights are irrelevant to the drawback adjustment. The Court holds that under 19 U.S.C. § 1677a(d)(1)(B) Commerce must determine the weight of the tubes to correctly allocate duties imposed on raw materials imported into Korea to tubes exported from Korea to the United States.

Defendant argues that even if the drawback adjustment is excluded the resulting margins of approximately .45 percent are less than .5 percent *ad valorem* and therefore *de minimis*. The Court holds that there is no rule that margins less than .5 percent are *de minimis* since Commerce has not promulgated such a rule in accordance with the notice and comment provisions of the Administrative Procedures Act, 5 U.S.C. § 553. Commerce may disregard the drawback adjustment and find the margins of .45 percent *de minimis*, but it must explain on the record why such margins are *de minimis* in this case.

[The case is remanded.]

(Decided April 29, 1986)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and J. Eric Nissley), for plaintiffs.  
Richard K. Willard, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Department of Justice (Sheila N. Ziff) for defendant.

*Dow, Lohnes & Albertson (William Silverman, John C. Jost, and Margaret B. Dardess), for defendant-intervenor Dong-Ah Tire Ind. Co., Ltd.*

*Arnold & Porter (Richard A. Johnson and Stephan E. Becker), for defendant-intervenor Heung-Ah Tire Ind. Co., Ltd.*

### MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge*: Plaintiffs, domestic producers of inner tubes, have moved for relief from the Court's order of October 24, 1985, affirming, except as to verification of the weights of the merchandise exported by intervenor Dong-Ah Tire Ind. Co., Ltd. (Dong-Ah), a final determination by the Department of Commerce, International Trade Administration (Commerce) that inner tubes from the Republic of Korea (Korea) are being sold in the United States at not less than fair value. *Carlisle Tire & Rubber Co. v. United States*, 9 CIT —, 622 F. Supp. 1071 (1985). Commerce subsequently filed a report of the weighing of Dong-Ah's tubes during its on-site verification, in accordance with the Court's order.

The questions to be decided are:

(1) whether Commerce has established a rule that dumping margins of less than .5 per cent *ad valorem* are to be disregarded as *de minimis*; and

(2) (a) whether Commerce must have determined the weights of intervenors' merchandise exported to the United States when it adjusted the United States price of the merchandise to account for import duties imposed by Korea on raw materials which were rebated (referred to by the parties as "drawback adjustments"); and, if so,

(b) whether those weights are different than the weights of the same merchandise verified by Commerce to adjust the foreign market value of the merchandise to allow for differences in physical characteristics of the merchandise sold in the United States and Korea ("merchandise adjustments"); and, if so,

(c) whether Commerce may use both sets of weights in accordance with law.

### BACKGROUND

Plaintiffs sought reconsideration of the Court's affirmance of Commerce's determination on two points. First plaintiffs challenged Commerce's comparison of the imported inner tubes according to product category as "such or similar merchandise" under 19 U.S.C. §§ 1677(16) and 1677b(a)(1)(A) (1982 & Supp. II 1984). On December 27, 1985, the Court, in an unpublished memorandum opinion and order, denied that part of plaintiffs' motion, explaining that plaintiffs' arguments were addressed at 9 CIT at —, 622 F. Supp. at 1076 & n.7.

Second, plaintiffs said that (1) commerce used one set of tube weights, derived from weighing sample tubes, for purposes of making merchandise adjustments pursuant to 19 U.S.C.

§ 1677b(a)(4) and 19 C.F.R. § 353.16 (1984), and another, higher, set of tube weights, derived from invoices and packing documents, for making drawback adjustments pursuant to 19 U.S.C. § 1677a(d)(1)(B), (2) Commerce's use of different export tube weights for different purposes was not supported by substantial evidence or in accordance with law, and (3) the Court should order Commerce to use the higher drawback weights in making merchandise adjustments.

In its December opinion the Court held that defendant and intervenors had not sufficiently addressed plaintiffs' argument that Commerce used conflicting sets of weights for the same merchandise in making drawback adjustments. The Court directed defendant to address at oral argument whether a dumping margin greater than *de minimis* would result if Commerce lowered the drawback adjustment using the tube weights verified by Commerce for determining the merchandise adjustment.

Defendant moved to set aside the Court's order directing oral argument claiming that the tube weights issue was moot since Commerce determined that the complete elimination of the drawback adjustment would result in dumping margins of .453506 percent for intervenor Heung-Ah Tire Ind. Co., Inc. (Heung-Ah) and, .457188 percent for Dong-Ah. In its brief defendant argued that:

the dumping margins are still below .5 percent and are thus *de minimis*. Since elimination of the adjustments for drawback would still result in *de minimis* margins, the issue raised by plaintiff concerning the use of a different set of data for making drawback adjustments is irrelevant.

*Defendant's Motion for Order (1) Withdrawing Court Order Directing Oral Argument to be Held and (2) Entering Judgment*, at 4. Commerce subsequently lowered the Heung-Ah margin to .440206 percent by eliminating the adjustment to United States price for Korean defense tax rebated for export sales and upwardly adjusting the United States price to account for duties and defense tax rebated on the inner tube valves.

Although plaintiffs had not objected to Commerce's use of the *de minimis* concept in Commerce's final determination, which found weighted average dumping margins of .03 percent for Heung-Ah and .01 percent for Dong-Ah, plaintiffs now argued that the new margins were not *de minimis*, and that the Commerce "rule" that margins less than .5 percent are *de minimis* is arbitrary and contrary to law.

At oral argument defendant declined to say what dumping margin would result if Commerce calculated drawback adjustment using the merchandise adjustment weights. Defendant said the drawback adjustment would not be recalculated without an order of remand. At the conclusion of oral argument the Court requested additional briefing on the *de minimis* issue.

The Court now holds that the action must again be remanded.

THE *De Minimis* ISSUE

Commerce has made no finding that margins of approximately .45 are *de minimis* in this investigation. Nevertheless, the Court agrees with counsel for defendant that if Commerce could validly apply a .5 percent *ad valorem* standard for determining whether a dumping margin is *de minimis*, judgment for defendant would be appropriate. But, the Court does not agree that Commerce can validly apply the .5 percent *de minimis* standard on this record.

Commerce may employ the *de minimis* concept. See *ASG Industries, Inc. v. United States*, 67 CCPA 11, 19, C.A.D. 1237, 610 F.2d 770, 776 (1979); *Carlisle Tire and Rubber Co. v. United States*, 1 CIT 352, 353-54, 517 F. Supp. 704, 706 (1981). In *Carlisle*, plaintiffs argued the even *de minimis* bounties and grants must be counter-vailed. Commerce found the aggregate subsidy to be .28 percent. The Court held that the *de minimis* doctrine applied in countervailing duty investigations. The Court did not discuss whether a fixed rate would be appropriate, or whether the .28 percent subsidy was *de minimis*, but the Court said that "a *de minimis* benefit is, by definition, of no significance whatever, \* \* \*." 1 CIT at 354, 517 F. Supp. at 706.

When Commerce assumed jurisdiction over antidumping investigations in 1980, it published final regulations for administering the antidumping law after public notice and comment. Commerce responded as follows to the public comment that it promulgate a regulation making dumping margins of 1.5 percent or less *de minimis*:

This suggestion was not adopted. While, under current practice, margins as high as 0.3 percent have been considered *de minimis*, no conclusions have yet been reached on whether a fixed standard for *de minimis* margins in antidumping investigations is appropriate and, if so, what that level should be. *If and when such a determination is made, appropriate changes in the regulations will be proposed.*

45 Fed. Reg. 8182, 8185-86 (1980) (emphasis added). Commerce apparently recognized that such a *de minimis* standard, when and if adopted, would be subject to public notice and comment.

So far as the Court is aware, Commerce has never proposed a rule, or even claimed, that a .5 percent test applies in all cases. However, Commerce did state in July, 1982:

Since the Department assumed responsibility for administration of the countervailing duty law on January 2, 1980 it has consistently applied the *de minimis* principle and has not found to be countervailable any entries made on or after January 1, 1980, which are subject to aggregate net subsidy rates of less than 0.5 percent *ad valorem*. This consistent administrative practice recognizes that at some point a benefit becomes so small that it is of no significance.

*Countervailing Duty Order in Float Glass from Belgium*, 47 Fed. Reg. 32467, 32468 (1982).

Without deciding whether the antidumping law allows Commerce to promulgate a rule that a particular *ad valorem* percentage is *de minimis* in all cases, the Court holds that any such rule must be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982) Commerce has not done this.

Under the APA, "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy \* \* \*." 5 U.S.C. § 551(4) (1982). The APA requires that when an agency issues a rule it must publish a notice of rulemaking in the Federal Register, "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b), (c).

The relevant exceptions to APA notice and comment are for "interpretive rules" and "general statements of policy." 5 U.S.C. § 553(b)(3)(A).

An "interpretive rule" under the APA does not create new law, rights, or duties. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 558-59 (D.C. Cir. 1983). Insofar as defendant claims the .5 percent threshold determines the rights and duties of parties to antidumping and countervailing duty proceedings before Commerce, the Court holds that the standard is not within the "interpretive rule" exception.

Nor is the .5 percent standard a "general statement of policy" under the APA. Courts have employed two criteria for distinguishing "rules" from "general statements of policy." A statement of policy is not a rule if (1) it acts only prospectively, and (2) it "genuinely leaves the agency and its decision-makers free to exercise discretion." *American Business Ass'n. v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). As applied by defendant in its brief, the .5 percent standard has present, not merely prospective, effect. Defendant does not argue that Commerce officials have discretion to find dumping where the margin is less than .5 percent.

The remaining exceptions to 5 U.S.C. § 553 are not relevant. A *de minimis* rule would not "clearly and directly" involve a "foreign affairs function" under section 553(a)(1), see *Mast Industries v. Regan*, 8 CIT 214, 596 F. Supp. 1567, 1580-83 (1984). Nor is the "good cause" exception, section 553(b)(B), applicable since there has been no finding by Commerce that the exception applies.

Since the .5 percent standard has not been promulgated in accordance with the notice and comment procedures of the APA, and

since it is not within any of the exceptions to those procedures, the Court holds that the standard is not a "rule".

Even though there is no "rule" that margins less than .5 percent are *de minimis*, Commerce may find that margins of approximately .45 percent are *de minimis* in this investigation. To do this Commerce must explain the basis for its decision. See *Motor Vehicle Manufacturers Ass'n. of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48-49 (1983); *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *SCM Corp. v. United States*, 84 Cust. Ct. 227, 236-37, C.R.D. 80-2, 487 F. Supp. 96, 103-104 (1980). See *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978).

Commerce has recognized that margins under .5 percent may not be *de minimis*. In 1981 Commerce, continuing previous Department of Treasury determinations in the case, found that a .37 percent subsidy on fasteners from Japan was not *de minimis* when compared with the duties on the merchandise, .7 and .2 percent *ad valorem*. *Certain Fasteners From Japan*, 46 Fed. Reg. 53484 (1981).

Small margins may be important. Duties on the tubes for tires other than bicycle tires, classifiable under item 772.60, Tariff Schedules of the United States, are currently 3.9 percent. The United States negotiated staged reductions in duty for the merchandise by as little as .1 percent per year during the period 1980-1986. See Proclamation No. 4707, 44 Fed. Reg. 72348, 72527 (1979). Should Commerce choose to disregard the drawback adjustment, it must explain why the resulting margins of approximately .45 percent are *de minimis* in this investigation.

#### CONFLICTING TUBE WEIGHT DETERMINATIONS

Intervenors paid Korea duty and defense tax when they imported synthetic rubber and other raw materials into Korea. Some of the materials were used in the manufacture of the tubes in this case. Pursuant to Korean law intervenors were entitled to a rebate of the duty and tax imposed on the raw materials used in making the tubes when the merchandise was exported from Korea.

The parties disagree on the tube weights Korea used in assessing the rebate. Plaintiffs claim Korea assessed the rebate on the basis of higher invoice and packing list weights supplied by intervenors rather than lower weights Commerce verified in making merchandise adjustments. Intervenors argue that Korea calculated the rebate on the basis of lower tube weights. Commerce does not indicate which weights Korea used in calculating the rebate; in its final determination Commerce says only that a drawback adjustment was made. 49 Fed. Reg. at 26781.

Defendant argues that the tube weights are irrelevant to the drawback adjustment under the antidumping law. Defendant says Commerce need only verify the amount of rebate received by inter-

venors. The Court is concerned that the negative determination may have resulted from the use of conflicting sets of weights.

Under the antidumping law dumping margins for imported merchandise are calculated by comparing determinations of foreign market value and United States price. See 19 U.S.C. § 1673 (1982 & Supp. II 1984). Upward and downward adjustments are made to foreign market value and United States price pursuant to statutory provisions. To prevent dumping margins from arising because the exporting country rebates import duties and taxes for raw materials used in exported merchandise, the antidumping law provides for an offsetting adjustment in the calculation of United States price. Under section 1677a(d)(1)(B), United States price must be increased by "the amount of any import duties imposed by the country of exportation which have been rebated." (Emphasis added). This amount must be verified. 19 U.S.C. § 1677e(a).

Congress has not directed Commerce to adjust United States price merely by the amount of the rebate received by the foreign producer; Commerce must adjust the United States price by the amount of duty imposed by the home market government on raw materials rebated because of merchandise exported to the United States. See *Color Television Receivers From Korea*; *Final Results of Administrative Review of Antidumping Duty Order*, 49 Fed. Reg. 50420, 50428 (Comment 33). The Court knows of no way, and none has been proposed, for Commerce to correctly allocate duties "imposed" on the raw materials imported into Korea to the tubes exported from Korea to the United States that does not involve determining the weights of the tubes.

The Court holds that Commerce necessarily must make a finding as to the weights of the merchandise when it adjusts United States prices pursuant to section 1677a(d)(1)(B). The failure of Commerce to state those weights, which constitutes the factual basis for a determination under section 1677a(d)(1)(B), leaves the record in this investigation incomplete.

Although Commerce is given great latitude in interpreting statutes it administers, our appellate court has recently affirmed that an agency interpretation may not contravene the legislative intent. *American Lamb Co. v. United States*, No. 86-560, slip op. at 13 (Fed. Cir. Feb. 28, 1986). Accordingly, the Court remands the action for Commerce to state on the record the exported tube weights accepted as valid by Commerce, and how rebates to intervenors were allocated to the exported tubes for purposes of an adjustment under section 1677a(d)(1)(B).

The Court has previously held that Commerce acted within its discretion in weighing sample tubes to determine tube weights for making merchandise adjustments, 9 CIT —, 622 F. Supp. at 1081-83. But if the weights accepted by Commerce for the section 1677a(d)(1)(B) adjustment are different than the weights verified by Commerce for the merchandise adjustment, and the use of these

conflicting sets of weights results in a negative rather than affirmative determination, Commerce must choose one set of weights to use for both adjustments.

#### CONCLUSION

The case is remanded to Commerce. Should Commerce choose to disregard the drawback adjustment, it must explain why the resulting margins of approximately .45 percent are *de minimis* in this investigation.

If Commerce adjusts United States price under section 1677a(d)(1)(B), Commerce is directed to supplement the record setting forth the tube weights used in calculating that adjustment. If the weights used by Commerce in making that adjustment were different than the weights verified by Commerce for merchandise adjustment purposes, and the use of these conflicting sets of weights results in a negative rather than affirmative determination, Commerce must choose one set of weights to use for both adjustments, and recalculate one of the adjustments and the dumping margins.

Consistent with the foregoing, Commerce is directed to supplement the record and make any necessary redetermination of intervenors' weighted-average dumping margins within thirty days from the date of this opinion.

So ordered.

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(Slip Op. 86-46)

RETAIL CLERKS INTERNATIONAL UNION, LOCAL 149F—FOOTWEAR  
DIVISION, PLAINTIFF *v.* RAYMOND J. DONOVAN, UNITED STATES  
SECRETARY OF LABOR, DEFENDANT

Court No. 81-11-01604

Before *RE*, Chief Judge.

#### MEMORANDUM OPINION AND ORDER

Plaintiff, on behalf of former employees of Prestige Shoe Company, moves for judgment on the agency record, contending that determination of the Secretary of Labor that the Prestige workers were not eligible for trade adjustment assistance benefits is unsupported by substantial evidence and not in accordance with law.

Held: Since the Secretary's methodology in reaching his determination was in accordance with law, and his conclusion supported by substantial evidence on the record, the plaintiff's motion is denied, and the action is dismissed.

[Judgment for the defendant; the action is dismissed.]

(Decided April 29, 1986)

*Ira H. Weinstock, P.C.*, for the plaintiff.

*Richard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff*), for the defendant.

*RE*, Chief Judge: In this action, plaintiff, Retail Clerks International Union, Local 149F—Footwear Division, on behalf of the

former employees of Prestige Shoe Company (Prestige), seeks review of a final determination by the Secretary of Labor which denied certification of eligibility under the worker adjustment assistance program of the Trade Act of 1974, tit. II, § 221-249, 284, 19 U.S.C. § 2271-2321, 2395 (1982 & Supp. I 1983). The Secretary determined that the plaintiff's petition failed to satisfy the third eligibility requirement of section 222 of the Trade Act of 1974. 19 U.S.C. § 2272(3) (1982). Specifically, the Secretary found that the workers were not eligible for assistance because an increase in imports did not contribute importantly to Prestige's decline in sales or production, and, thus, to the separation from employment of Prestige's workers.

Plaintiff contests the Secretary's determination. Plaintiff contends that the Secretary's reliance on a customer survey, and the failure to take any testimony from Prestige officials or attorneys, renders the Secretary's decision arbitrary and unsupported by substantial evidence. In essence, plaintiff challenges the nature and extent of the Secretary's investigation.

After reviewing the administrative record and all pleadings and contentions, the Court holds that the Secretary's denial of certification is supported by substantial evidence, and is in accordance with the law. Hence, the determination of the Secretary is affirmed.

#### ADMINISTRATIVE PROCEEDINGS

On August 29, 1980, plaintiff filed a petition with the Office of Trade Adjustment Assistance (OTAA) for certification of eligibility to apply for trade adjustment assistance benefits pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a) (1982). The OTAA published a notice of the filing of the petition, and initiated an investigation. 45 Fed. Reg. 62,580 (1980).

The OTAA's investigation disclosed that all of the employees of Prestige were engaged in employment related to the production of women's casual shoes. These employees performed various tasks, such as designing, cutting, assembling, and packaging the shoes. Prestige produced some component parts, such as heels and soles, and purchased the remaining parts from independent suppliers. The shoes produced were primarily made of leather and vinyl uppers with rubber bottoms, and were assembled by a cementing process. The company was a wholly owned subsidiary of Frier Industries, Incorporated, but operated independently from other Frier Industries subsidiaries. It ended production of women's shoes on July 31, 1981.

The OTAA's investigation included a report on the women's non-rubber footwear industry. This report disclosed that imports of these goods fluctuated, with a net increase of 0.2 percent between 1976 and 1980. There was, however, a decline of 20.1 percent in imports of that type of footwear in 1980 compared to 1979. The OTAA investigation further revealed that domestic production decreased

2.4 percent between the years 1979 and 1980, due mainly to a reduced demand for women's nonrubber footwear.

On the basis of information supplied by the president of Prestige, the OTAA found that "virtually all" of Prestige's decline in sales between 1979 and 1980 was attributable to decreases in purchases by one major customer. A confidential survey disclosed that this customer had decreased its imports of women's footwear in 1980 compared to the previous year, while increasing its purchases of domestically produced shoes.

Based on these findings, the Secretary concluded that imports of women's footwear did not contribute importantly to the downturn in Prestige's sales, and the resulting separation of the firm's employees. Consequently, the Secretary denied plaintiff's petition for certification. 46 Fed. Reg. 42,542 (1981).

Plaintiff then sought administrative reconsideration of the Secretary's negative determination. Its claim was largely based on the fact that the Company had ceased its operations since the certification request was made, and that the Secretary had failed to inquire into the company's reasons for having ceased operations. The union asserted that Company officials had told workers in June 1981 that the Company had lost a substantial amount of business from a major customer as a result of imports. This was the same customer the OTAA had surveyed in its investigation.

In dismissing plaintiff's application for reconsideration, the OTAA explained that the request provided no new information which would furnish a basis for certifying the former employees of Prestige for assistance. The OTAA noted that the survey of Prestige's main customer revealed not only that this customer had decreased its imports but also that it had increased its domestic purchases of women's footwear. Based on these findings, the Secretary found no new grounds for reconsideration.

On November 25, 1981, plaintiff commenced this action by filing a letter complaint seeking judicial review of the Secretary's final determination. This action is now before the Court on the plaintiff's motion for judgment on the administrative record.

#### DISCUSSION

Under section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976), the Secretary is to certify a group of workers as eligible to apply for adjustment assistance if it is determined:

- (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
- (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an ap-

propriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Trade Act of 1974 § 222, 19 U.S.C. § 2272 (Supp. I 1983).

The Secretary has interpreted section 222(3) of the Trade Act of 1974 in a uniform and consistent manner. Under this interpretation, trade adjustment assistance is authorized for workers if it can be established that an important causal nexus exists between increased imports and the workers' separation from employment. *Abbott v. Donovan*, 6 CIT 92, 101, 570 F. Supp. 41, 49 (1983). The term "contributed importantly" refers to the causal nexus, and suggests a direct and substantial relationship between increased imports and the decline in sales and production. See *Estate of Finkel v. Donovan*, 9 CIT —, —, 614 F. Supp. 1245 1251 (1985); *Abbott v. Donovan*, 8 CIT 237, 240, 596 F. Supp. 472, 475 (1984).

The Secretary denied petitioner's claim for certification for failure to satisfy the third eligibility criterion. This determination was based on the finding that increased imports did not contribute importantly to the decline in sales or production at Prestige, or to the separation from employment of the workers.

Plaintiff maintains that the court must set aside the Secretary's denial of certification because the OTAA's findings were flawed and insufficient. More specifically, plaintiff challenges the OTAA's method of investigation. Plaintiff contends that the customer survey did not permit the OTAA adequately to evaluate the reasons for Prestige's decline in sales and eventual closing. Plaintiff also asserts that the OTAA's failure to take any testimony from Company officials and attorneys renders the Secretary's decision arbitrary and unsupported by substantial evidence.

Section 284(b) of the Trade Act of 1974, 19 U.S.C. § 2395(b) (1982) empowers this court to review a decision by the Secretary which denies a petition for certification of eligibility for trade adjustment assistance benefits. Judicial review is available to ensure that the determination by the Secretary is supported by substantial evidence contained in the administrative record, and is in accordance with law.

The OTAA, as the Secretary's designate pursuant to section 248 of the Trade Act of 1974, 19 U.S.C. § 2320 (1982), is authorized to conduct an investigation of plaintiff's petition. Trade Act of 1974 § 221(a), 19 U.S.C. § 2271(a) (1982). While the OTAA has a duty to investigate, the nature and extent of the investigation are matters that properly rest within the sound discretion of the administrative officials. *Woodrum v. Donovan*, 4 CIT 46, 51, 544 F. Supp. 202, 206 (1982), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984).

The use of the customer survey as an investigative method has been approved by the courts in several cases. *Cherlin v. Donovan*, 7 CIT 158, 585 F. Supp. 644 (1984); *United Glass and Ceramic Workers of North America v. Marshall*, 584 F.2d 398 (D.C. Cir. 1978);

*Local 167, International Molders and Allied Workers' Union v. Marshall*, 643 F.2d 26 (1st Cir. 1981). While the courts have characterized the survey method as "not a very sophisticated test," they have, nevertheless, held that the technique is a reasonable means of ascertaining the existence of a causal nexus between increased imports and a firm's lost sales, and the resulting separation of its employees. *Local 167, supra*, 643 F.2d at 30 (quoting *United Glass & Ceramic Workers, supra*, 584 F.2d at 405).

As this court explained in *Cherlin v. Donovan*:

[A]dministrative officials must have the necessary flexibility to discharge their official responsibilities under the worker adjustment assistance program. While the court may identify flaws in the methodology used by the Secretary, it is not the court's function to substitute its own method of analysis for that of the Secretary. Rather, the court will substantially defer to the Secretary's "chosen technique, only remanding a case if that technique is so marred that the Secretary's finding is arbitrary or of such nature that it could not be based on 'substantial evidence.'"

*Cherlin*, 7 CIT at 162, 585 F. Supp. at 647 (quoting *United Glass & Ceramic Workers, supra*, 584 F. 2d at 405). In this case the plaintiff has not offered any sound justification for disregarding the OTAA's customer survey as a reasonable and proper means of assessing the impact of imports on Prestige.

As noted, the investigation revealed that one major customer accounted for nearly all of Prestige's decline in sales between 1979 and 1980. Thus, on these facts, it was not improper for OTAA to survey only this major customer. Although Prestige's sales to this customer dropped dramatically from 1979 to 1980, the customer's response to the survey clearly indicated that this customer decreased its import purchases between 1979 and 1980, while increasing its purchases of casual women's shoes from domestic sources. Thus, there is no question that there is substantial evidence on the record to support the Secretary's finding that imports did not contribute importantly to the worker separations at Prestige.

The plaintiff's contention that the Secretary's failure to take testimony from company officials to explain the closing of the company's operations was improper is without merit. Although this court has the authority to remand a case to the Secretary to take new evidence, the court will exercise this power only when "good cause" is shown. See 19 U.S.C. § 2395(b) (1982).

Section 284(b) of the Trade Act of 1974 provides in pertinent part:

(b) The findings of fact by the Secretary of Labor \* \* \* if supported by substantial evidence, shall be conclusive; but the court, for good cause shown; may remand the case to such Secretary to take further evidence \* \* \*.

19 U.S.C. § 2395(b) (1982). As this court explained in *Abbott v. Secretary of Labor*, 3 CIT 54 (1982), this statute, in conjunction with 28 U.S.C. § 2640(c) (1982), requires that this court review the Secretary's determination on the basis of the administrative record, and prohibits the introduction of new evidence in this court. 3 CIT at 55. As the *Abbott* court noted, the rule that judicial review of administrative action must be based on the administrative record, and that the reviewing court may not receive new evidence is a well-settled principle of administrative law. *Id.* (citing *Cincinnati, N.O. & Tex. Pac. Ry. v. ICC*, 162 U.S. 184 (1896); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963)). Nevertheless, the statute expressly provides that, "for good cause shown," the action may be remanded to the Secretary for the purpose of receiving new evidence. 19 U.S.C. § 2395(b) (1982). The Secretary may then make new or modified findings on the basis of the new evidence. *Id.* Thus, in the *Abbott* case, in accordance with this provision, the court remanded the action to the Secretary to supplement the record with the proffered evidence. 3 CIT at 55.

In the present case, the court must determine whether the plaintiff has shown "good cause" for remanding the action to take further evidence. It is the determination of the Court the plaintiff has not demonstrated good cause for remand.

In July 1981, an OTAA official spoke directly with the President of Prestige, who provided information pertaining to the company's sales and market. This information indicated that the company's decline in sales was largely attributable to one customer's decreased purchases. The information received from this customer indicated that the Prestige sales were lost to *domestic*, not import, competition. There is no reason to believe that the customer supplied incorrect information to the OTAA. Nor is there reason to believe that Prestige officials would have better information about this customer's purchases than the customer itself. Thus, the OTAA had no obligation to seek out indirect information about sales losses from Prestige officials, when it had received direct and reliable information from the customer itself.

#### CONCLUSION

After a thorough review of the record, the contentions of the parties, and the applicable law, the Court has concluded that the Secretary's investigation was not so marred that his determination was arbitrary, or not in accordance with law. The record reveals that the customer survey provided the Secretary with a sufficiently accurate picture of the factors accounting for the significant majority of Prestige's lost sales. These sales, the record reveals, were lost to domestic, not import, competition.

Accordingly, it is the determination of the court that the Secretary of Labor's denial of certification is supported by substantial evidence, and is in accordance with the trade adjustment assistance

provisions of the Trade Act of 1974. The final determination of the Secretary is, therefore, affirmed, and plaintiff's action is dismissed.



# ABSTRACTED CLAS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESS
				Item No. a
C86/60	Carman, J. April 15, 1986	Mattel, Inc.	82-8-01184	Item 737.22 16.8% or
C86/61	Carman, J. April 15, 1986	Mattel, Inc.	83-12-01718	Item 737.22 17.5% or Item 737.24 15.4%
C86/62	Carman, J. April 15, 1986	Mattel, Inc.	85-4-00584	Item 737.24 14.8% or
C86/63	DiCarlo, J. April 15, 1986	Eiseman-Ludmar Co.	82-7-00928, etc.	Item 798.00 9%, 8.4%, 7.9% by similitu
C86/64	DiCarlo, J. April 15, 1986	Izod Outerwear	81-9-01299, etc.	Item 380.84 \$0.25 per plus 27
C86/65	DiCarlo, J. April 15, 1986	Izod Outerwear	83-12-01757, etc	Item 379.95 \$0.25 per 27.5%, \$0.21 pe + 27.5

# CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate	Item No. and rate		
737.22 8.8% or 16.1%	Item A774.55 Free of duty Item 774.55 7.7%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
737.22 8.5% or 16.8%	Item A774.55 Free of duty Item 774.60 8.5%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
737.24 8.4%	Item A774.55 Free of duty	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
737.24 8.8% or 14.1%	Item 703.35 \$2.33 per dozen + 3.4%. \$2.13 per dozen + 3.1%, \$1.92 per dozen + 2.8%	Eisenman-Ludmar Co. v. U.S., decided April 8, 1985	New York Fur felts, and similar articles
380.84 25 per lb. + plus 27.5%	Item 376.56 16.5%	Izod Outerwear v. U.S., S.O. 85-72	New York Men's 100% nylon jackets, style No. 8932
379.95 25 per lb. + 27.5%, or \$0.21 per lb. + 27.5%	Item 376.56 15% or 13.5%	Izod Outerwear v. U.S., S.O. 85-72	New York Men's 100% nylon jackets, style No. 8932

# ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item
C86/66	Restani, J. April 16, 1986	Alfa-Laval Inc.	83-12-01778, etc.	Item 661.35 4.2% or 4%	Item Fr
C86/67	Restani, J. April 16, 1986	Applied Motion Products	83-9-01363	Item 682.25 10.3%	Item 5.3
C86/68	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01837	Item 121.59 5%, 2%, or 1%	Item Fr
C86/69	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01838	Item 121.59 5%, 2%, or 1%	Item Fr
C86/70	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01839	Item 121.59 5%, 2%, or 1%	Item Fr
C86/71	Restani, J. April 16, 1986	Import Leather, Inc.	80-10-01844	Item 121.59 5%, 2%, or 1%	Item Fr

N DECISIONS—Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Item 870.40 Free of duty	Customs Service ruling dated Sept. 27, 1983	Buffalo Bulk milk coolers or farm tanks
Item 682.30 5.3%	Agreed statement of facts	Los Angeles Stepper motors
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., <i>aff'd</i> , 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., <i>aff'd</i> , 708 F.2d 715 (Fed. Cir. 1983)	Boston, Leather
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., <i>aff'd</i> , 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item A121.65 Free of duty	Leather's Best, I nc. v. U.S. <i>aff'd</i> , 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather

# ABSTRACTED V

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V86/37	Re, C.J. April 14, 1986	Alexander's Inc.	74-1-00133	Export value
V86/38	Re, C.J. April 14, 1986	Mitsui & Co.	73-8-02365	Export value
V86/39	Re, C.J. April 15, 1986	Mitsui & Co.	74-5-01419	Export value
V86/40	Aquilino, J. April 15, 1986	C. Itoh & Co.	79-9-01477	Export value

# ED VALUATION DECISIONS

BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	New York Not stated
value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	San Francisco Mobile Los Angeles New York Philadelphia Boston San Juan Savannah Not stated
value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	San Juan New York Mobile Detroit Los Angeles Portland Cleveland Philadelphia Not stated
value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp., v. U.S., C.D. 4739	New York Not stated

# ABSTRACTED VALUATION D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/41	Watson, J. April 16, 1986	Providence Import Co.	R60/8827	Export value	A
V86/42	Watson, J. April 16, 1986	Toyomenka, Inc	R63/4647, etc.	Export value	A
V86/43	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/4287, etc.	Export value	A
V86/44	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/15412, etc.	Export value	A
V86/45	Watson, J. April 16, 1986	Transamerican Import & Export Co.	R61/18100, etc.	Export value	A
V86/46	Re, C.J. April 17, 1986	Marubeni America Corp.	74-7-01781	Export value	C
V86/47	Watson, J. April 17, 1986	Bemo Shipping Co.	267192A, etc.	Export value	M
V86/48	Watson, J. April 17, 1986	Benj Wolf Co.	227722A, etc.	Export value	M

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Appraised values less 7.5% thereof	Agreed statement of facts	Baltimore Rugs
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
Appraised unit values less 7.5% thereof, net packed.	Agreed statement of facts	Los Angeles, New York Transistor radios together with their accessories and parts; an entirety
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
CIF resale unit prices less any included ocean freight and marine insurance and without any percentage additions	Agreed statement of facts	New York Binoculars
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk scarves, etc.

V86/49	Watson, J. April 17, 1986	Bunge Corp.	215224A, etc.	Export value	Ap
V86/50	Watson, J. April 17, 1986	Bunge Corp.	276197A, etc.	Export value	Ap
V86/51	Watson, J. April 17, 1986	C.M. Import & Export Corp.	R61/2678, etc.	Export value	Fa
V86/52	Watson, J. April 17, 1986	Eclair Scarf Corp.	275061A, etc.	Export value	Fa
V86/53	Watson, J. April 17, 1986	Gosho Trading Co.	R58/20919, etc.	Export value	Fa
V86/54	Watson, J. April 17, 1986	International Importers, Inc.	R61/4250, etc.	Export value	Fa
V86/55	Watson, J. April 17, 1986	J.C. Penney Corp.	R60/154000, etc.	Export value	Fa
V86/56	Watson, J. April 17, 1986	S.E. Lasko	262996A, etc.	Export value	Fa
V86/57	Watson, J. April 17, 1986	S.E. Lasko	R58/25912, etc.	Export value	Fa
V86/58	Watson, J. April 17, 1986	Mercury Radio & Battery Corp.	R64/6423, etc.	Export value	Ap

Appraised values less 7.5% thereof	Agreed statement of facts	Seattle Wool hooked rugs
Appraised values less 7.5% thereof	Agreed statement of facts	New York Wool hooked rugs
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon scarves
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Wilmington Brassieres, gloves and oval tubing mats
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars
Appraised unit value less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety

# ABSTRACTED VALUATION DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/59	Watson, J. April 17, 1986	Mitsui & Co.	R63/6536, etc.	Export value	F.o.b. of f.o.b. prai
V86/60	Watson, J. April 17, 1986	Morris Struhl, Inc	R59/8654, etc.	Export value	Appra ther
V86/61	Watson, J. April 17, 1986	Nichimen Co.	R63/869, etc.	Export value	Appra ther
V86/62	Watson, J. April 17, 1986	Nichimen Co.	R63/3946, etc.	Export value	F.o.b. of f.o.b. prai
V86/63	Watson, J. April 17, 1986	Nichimen Co.	R63/6517, etc.	Export value	Appra 7.5%
V86/64	Watson, J. April 17, 1986	Nomura (American) Corp.	R64/2035, etc.	Export value	F.o.b. of f.o.b. prai
V86/65	Watson, J. April 17, 1986	Rugby Int'l Corp.	R65/14659	Export value	Appra ther
V86/66	Watson, J. April 17, 1986	S. Shamash & Sons, Inc	R58/22454, etc.	Export value	F.o.b. plus betw and
V86/67	Watson, J. April 17, 1986	S. Shamash & Sons, Inc	R58/23315, etc.	Export value	F.o.b. plus betw and

## DECISIONS—Continued

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; an entirety
Appraised values less 7.5% thereof	Agreed statement of facts	New York Stainless steel flatwear
Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles New York Sewing machine heads
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; an entirety
Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts, an entirety
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Seattle Transistor radios together with their accessories and parts; an entirety
Appraised values less 7.5% thereof	Agreed statement of facts	New York Tube mats
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics, etc.
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics

V86/68	Watson, J. April 17, 1986	S. Shamash & Sons, Inc	R58/23748, etc.	Export value
V86/69	Watson, J. April 17, 1986	Toyobo N.Y. Inc	R59/5086, etc.	Export value
V86/70	Watson, J. April 17, 1986	W.J. Byrnes & Co.	R59/11763, etc.	Export value

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabrics
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Wool cloth
Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabrics, etc.

# Appeals to the U.S. Court of Appeals for the Federal Circuit

Philipp Brothers, Inc. v. United States, 10 CIT —, Slip Op. 86-16 (Feb. 14, 1986), *appeal docketed*, No. 86-1122 (Fed. Cir. April 14, 1986).

Yuri Fashions Co. v. United States, 10 CIT —, Slip Op. 86-33 (March 24, 1986), *appeal docketed*, No. 86-1126 (Fed. Cir. April 14, 1986).

## NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is \$10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

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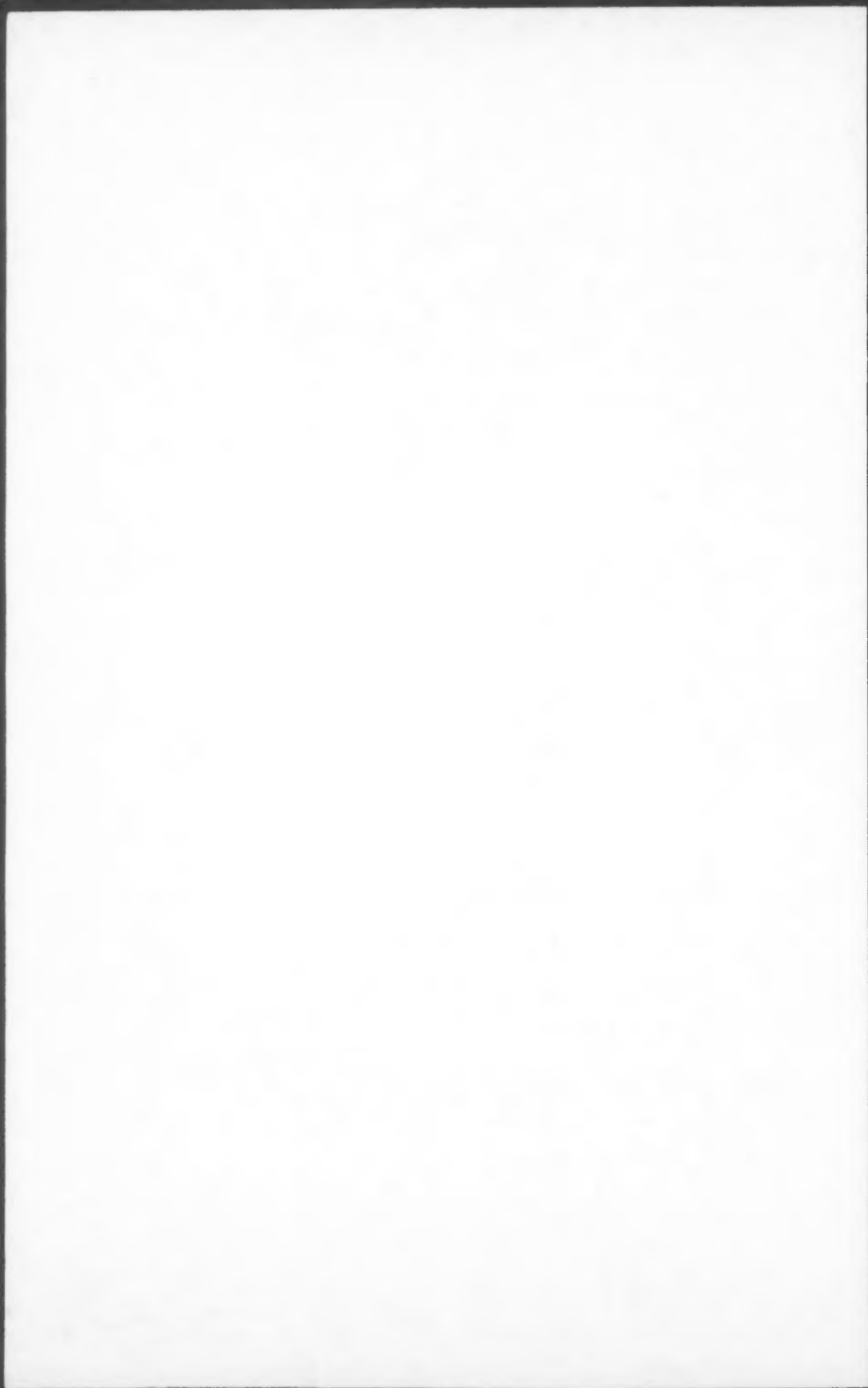
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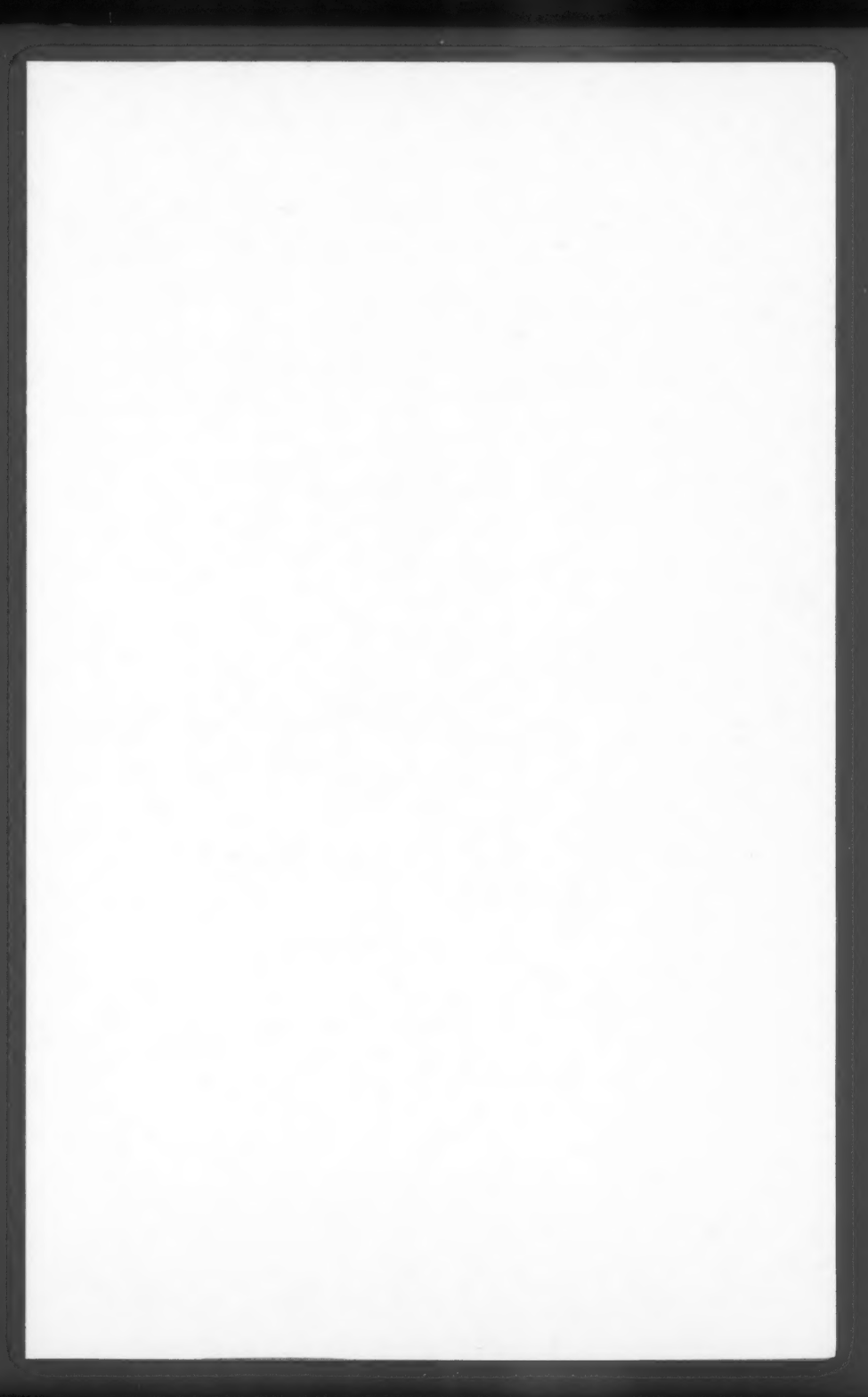
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